A

# VIEW

OF THE

# English Constitution,

WITH RESPECT

To the *Sovereign Authority* of the

# PRINCE,

And the *Allegiance* of the

# SUBJECT.

In Vindication of the *Lawfulness* of Taking the OATHS, To her Majesty, by Law Required.

*By* WILLIAM HIGDEN, *M. A.*

*The Third Edition.*

*LONDON*, Printed for *S. Keble* at the *Turk's-Head* over against *Fetter-lane*, and *R. Gosling* at the *Mitre* over against *Chancery-lane*, in *Fleet-street*, 1710.

# VIEW
OF THE
# English Constitution,
WITH RESPECT
To the Sovereign Authority of the
# PRINCE,
And the Allegiance due
# SUBJECT.

AFTER I had passed, so many Years of my Life, without being able to Reconcile my Self to the Oaths; in the Course of my Studies, I met with some Passages, which gave me Cause to suspect, that I had in some particulars mistaken the English Constitution: And altho' they did not carry so great a Weight and Evidence, as to induce me to alter my Sentiments in the main; yet I confess they made me pause, gave me occasion for Reflection, and inclined me once more to take a Review of the Judgment I had made so many Years ago; with an Intention, that if upon this Inquiry, I should find my *former Judgment* was well grounded, to sit down under it in a quiet and inoffensive way, whatever Inconveniences might attend it: If not, then, with my Judgment, to alter my Practice.

The *Method*, and *Result* of my Inquiries, the Reader will meet with in this Discourse. And whilst I was making

them, I was very free, and open in discoursing with as many of my Old Friends, as were willing to talk with me upon this Head, and with Those especially, whom I took to be best acquainted with our Constitution, and most versed in this Controversy. And could I not have solved their Objections to my own satisfaction, I should have stop'd here; and these Papers, as they were never intended for the Publick at first, had never seen the Light: Part of which are Two Letters in Answer to the Objections of Two of my Friends, with little Alteration more than was necessary, to make them of a Piece, with the rest of this Discourse.

If any Gentlemen of the Law, should think this Little Piece worth their perusal; they may be apt to say, that I have labour'd some Points too much, in proving (what was obvious) the Legislative Authority of *Kings for the time being*, but I was sensible that some, whom I should be heartily glad to serve by this

Discourse,

Discourse, were not so well apprized of this Matter.

Now if any one asks, why I was convinced no sooner? I shall return a very short, but a very True Answer: Because I had not sooner a thorough Insight into our *Constitution*, and *Laws*, relating to this Great Point.

An Opinion, or a Practice of Twenty Years Standing; will always have the force of Prejudice on its side; but this will make but a light Impression on Minds, which have this single Important Question in their View: Whether the Thing be *Lawful* or *Unlawful*, a *Duty* or a *Sin*?

The Success which this Discourse hath met with, amongst some of those that have seen it in Mss. has been no small inducement to the Publication of it. And, I hope, I have treated the Subject in such a manner, as not to offend those, whom it may not convince.

All Subjects, Those especially, where Conscience is concern'd, or which any way

*Advertisement.*

IN a short time will be published a *Defence* of the *View of the English Constitution* &c. by way of Reply to the *Utopian Remarker*, with some Animadversions, on the *Natural Born Subjects* Letter by the Author of the View.

## CHAP. I.

*The* Supreme Authority *of the Engliſh Government reſts in the King* for the time being, *and the* Allegiance *of the Subjects is due to him by the* Common Law *of this Realm.*

I Shall firſt conſider the Authority of the King *for the time being*, by the *Common Law*, and then by the *Statute Law* of this Realm. Now Common Law is common *Cuſtom* and *Uſage*, or *Judicial Proceedings* and *adjudged Caſes*, as they appear in Judicial Records and the Year Books.

As for common Cuſtom and Uſage, which by an uninterrupted Practice, through a long Tract of time, obtains the force of Law; This is ſo evidently on the ſide of the *Regnant* King, that the People of *England* always ſubmitted, and took Oaths of Fidelity to the *Thirteen* Kings, who from the Conqueſt to *Henry* the VII. came to the Throne without Hereditary Titles, as well as to the *Six* Hereditary Kings, who Reigned

in that Period; and this so universally, that I don't know there are any *Non-jurors* to be found in all those Reigns. Of those Kings few met with greater Opposition than *William* the I. and yet after his Government was settled, Oaths of Fidelity were universally taken to him. *Ingulph* who liv'd in his Reign, saith, *After his return into* England, *having commanded every Inhabitant of* England *to do him Homage at* London, *and to Swear Fealty to him against all Men*; *He caused the whole Land to be measured, nor was there a Hide of Land in* England *but he knew it's Value and Owner.* The Oaths were, it seems, as strictly, exactly, and universally tender'd, as the Lands described in Doomsday-Book; and yet we hear not of one *Refuser*. *Roger de Hoveden* speaks of another time, when he commanded, *That the Archbishops, Bishops, Abbots, Earls, Barons, and Sheriffs, should with their Tenants by Knights Service*

---

* *Reversusque in Angliam apud Londonias hominium sibi facere, & contra omnes homines fidelitatem jurare, omnem Angliæ Incolam imperans totam terram descripsit, nec erat hida in Anglia quin valorem ejus & possessorem scivit. Hist.* 516. See also *W.* of *Malmsbury de Willielmo primo fol.* 59.

† *Ut Archiepiscopi, Episcopi, Abbates, Comites, Barones, Vicecomites, cum suis Militibus sibi occurrerent Saresbrie, quò cum venissent milites illorum sibi fidelitatem contra omnes homines jurare coegit. In Willielmo Seniore p.* 164.

meet

*meet him at* Salisbury, *and when they came thither, he made their Tenants swear Fealty to him against all Men.* If we descend to the other Kings, who Reign'd without an Hereditary Title, we shall find none of their Subjects refused to Swear Allegiance to them.

It is no wonder if some, who submitted, revolted afterwards (and from what Kings have there not been Revolts ?) or that when they revolted, they objected to the King's Title, and made it a pretext for their Revolt. Thus *Odo* Bishop of *Bayeux* and Earl of *Kent* being, as *William* of *Malmsbury* relates †, highly discontented, because the Bishop of *Durham*, and not himself, was Chief Minister, as he had formerly been, Rebelled against his Nephew King *William* the II. and with some other great Men who were discontented too, formed a powerful Party against him, in favour of *Robert* Duke of *Normandy*, who, he said, had a better Title, and would make a better King. But this is no Prejudice to what I have asserted ; since it is evident, that he himself as well

† *Cum omnia non suo arbitratu (ut olim) in regno disponi videret (nam Willielmo Dunelmensi Episcopo commendata erat rerum publicarum administratio) livore ictus & ipse à rege defecit, & multos eadem susurro infecit,* Roberto *Regnum competere, qui sit & remissoris animi, &c.* *De* Willielmo *secundo, l. 4. fol. 67.*

as the other Great Men whom he drew into his Party, had lived as Subjects and ſworn Allegiance to King *William*; otherwiſe their Revolt could not be charged with Perjury, as it is, by the Archdeacon of *Huntingdon*. †

Of all the great Men we meet with in our Hiſtory, none were more likely to have ſtood out againſt the Government of a King *de Facto*, than *Robert* Earl of *Gloceſter* Baſe Brother to the Empreſs *Maud*, and afterwards the great Supporter of her Cauſe, and *Thomas Merks* Biſhop of *Carliſle*; and yet it is certain, that the former ſwore Allegiance to King *Stephen*, and the latter ſat in *Henry* the IVth's firſt Parliament, in which thoſe Acts were paſs'd that we have in the Statute Book; for it was at the cloſe of that Parliament, he made his Speech in behalf of King *Richard*, and ſome time after pleaded King *Henry*'s Pardon for a Conſpiracy againſt him, of which he ſtood condemned to dye.

It has been, I know, obſerved, that *Robert* Earl of *Gloceſter* did Homage *Conditionally*

† *Omnes namque Nobiliores procerum in* Willielmum *juniorem* non ſine perjurio *bellum moventes, & Robertum Patrem ſuum in regnum aſciſcentes, ſuis quique Provinciis debacchantes.* Henr. Huntindonienſis *Hiſt.* L. 7. fol. 213.

to

to King *Stephen*, which is true enough; but then it is as true, that none of the Conditions which he interposed, had any manner of regard to the Titles, either of *Maud* or *Stephen*, as may be seen in † *William* of *Malmsbury* who lived at that time, and dedicated his History to that great Earl.

When we hear of a numerous Party that espoused the Title of the House of *York*, we are apt to look upon them to have been so many *Non-jurors* to the Kings of the House of *Lancaster*. But this is a great mistake; for all the Partizans of that House lived in Submission, and took Oaths of Allegiance to the three *Henries*; nay, *Richard* Duke of *York* himself, the Heir of that Family, swore Allegiance several times to King *Henry* the VI. particularly in the 29th Year of his Reign, in as full Terms as could be well expressed. His Revolt afterwards was under colour of Redressing Grievances, however he made use of his Arms, and his Power when he got it, to set up his Claim. And altho' his Son *Edward* the IV. succeeded against *Henry* the VI. and got the Throne, yet when he was driven from it,

† *Malmsb. Historiæ Novellæ fol.* 101. 6.

Ten Years after, the Nation ſubmitted again to *Henry* the VI. who, upon his Readeption, held a Parliament.

*Precedents*, I confeſs, are not always Arguments of the ſtrongeſt kind, if the Perſons themſelves are of no great Authority, or the Precedents few, or as many Precedents may be produc'd on the other ſide: But that of ſo many Millions as have liv'd under *de facto* Kings, of ſo many Biſhops and Clergy-men, ſome of them eminent for Learning and Piety; of ſo many Temporal Lords and Stateſmen of great Abilities; of ſo many Lawyers and Judges, ſome of them renown'd for their Skill in their Profeſſion, (particularly in *Henry* IVth's Reign, as my Lord Chief Juſtice *Coke* ſays, † *the Courts of Juſtice were fill'd with Men equal to any of their Predeceſſors in the Knowledge of the Law.*) That of all theſe who liv'd in ſo many different Reigns, to think there ſhould be none who underſtood the Conſtitution and their Duty, or had Virtue enough to ſuffer for it; is to entertain a very mean, or a very hard Opinion of our Anceſtors. In Modeſty, we cannot but allow them to underſtand what the

† *Inſtit. Part.* 3. *Ch.* 1.

Con-

Conſtitution was in their *Own* times, at leaſt, better than *We* can at this diſtance, and in Charity we cannot but believe that they acted agreeable to it. And if it was the Conſtitution from the Conqueſt to *Henry* the VII. as this univerſal Practice, and *common Uſage* of all Orders and Degrees of Men, muſt at leaſt induce a very ſtrong Preſumption that it was, it will be found, I believe, that the *Conſtitution* has deſcended the ſame to us; for there has no Law been made, ſince that time, concerning this matter, but that of the Eleventh of *Henry* the VII. which juſtifies this Practice, and enacts the *Uſage* into a *Statute* of the Realm.

But Secondly, if we will be ſo ſevere to our Anceſtors, as to believe, that none of them underſtood their Duty as Subjects, or if they did, none of them practiſed it, and that they acknowledged an Authority which the Laws condemned; we ſhall then ſurely find this Authority diſown'd in the ſucceeding Reigns of Hereditary Kings, thoſe eſpecially, who made their way to the Throne with the Deſtruction of their Rivals. But inſtead of that, we find the Subjects juſtified, in what they had done, by thoſe Kings; who in all the Proceedings of their Courts of Judicature, and in their Acts of Parliament, acknowledg'd that very Authority

to which the Subjects before had ſworn, and paid their Allegiance. Could it then be the Duty of Subjects to diſown an Authority *for the ſake of Kings de jure*, which Kings *de jure* themſelves own? Nay when theſe Kings, after the *de facto* Government was determin'd, and their own Government eſtabliſh'd, own'd the Anthority of their Predeceſſors *de facto*, is it reaſonable for Subjects to diſown the Authority of ſuch Kings, whilſt they live *under* their Government, and there is no *other* Government but *That?* Or can any of the Subjects do ſo, without oppoſing their *private Opinions* in matters of Government, to that which they themſelves confeſs to be the *ſupreme Authority* and *Judgment* of the Kingdom? And can the Peace of Communities be maintain'd, or any Government ſubſiſt on theſe Terms?

Now that Kings *de jure* have acknowledged the Authority of Kings *de facto* in as ample a manner as they have done that of their Progenitors of the moſt undoubted Right; I appeal to the *Common Law*, and *Statute Law* of this Realm; to the *Year Books* for the one, and the *Statute Book* for the other, which will reduce this Controverſy to *Matter of Fact*.

I begin with the *Year Books* of the Reigns of such Kings *de jure*, who cut out their way to the Throne with their Swords, and the Destruction of their Rival Kings *de facto*, and therefore the most unlikely of any to acknowledge them; and yet we find their Authority as much acknowledged by these Kings *de jure*, in all their Courts of Judicature, as that of any of their Ancestors of the clearest Title.

1. Upon the Death or *Demise* of any King of *England*, (by whose Authority and in whose Name the Laws are administred) all Actions, Suits, *&c.* which were depending in any of the King's Courts, were discontinued, and the Parties put off, so that the Plaintiffs were compell'd to begin their Actions again, or to sue a *Resummons* to revive their Actions until the 1 of *Edward* the VI. C. 7. provided a Remedy. Thus it was after the Death of *Edward* the IV. in the Courts of *Edward* the V.

† In *Michaelmas Term* in the 1st Year of *Edward* V. Fol. 1.

*And upon this they were at Issue, and after the Issue the Defendant gave Bail*

† *De Termini Mich. an.* 1. *Regis Edwardi V. Fol.* 1. *Et sur ces fuer a issue, & aprs. l'issue le def. fuit lisse a maynprise par recognisaunce, & puis le issue fuit discontinue par le demise le Roy Edw. quart.*

*by*

*by Recognizance, and afterwards the Iſſue was diſcontinued by the* Demiſe *of King* Edward *the IV.*

* Thus in the Courts of *Edward* the IV. after the Diſpoſſeſſion of *Henry* VI. *viz.* in the 1ſt Year of *Edward* IV. Fol. 2.

*They were at Iſſue in* Hilary Term *in the 39th Year of K.* Henry *VI. and the Plea was diſcontinued by the* Change *of the* King. *And in* Trinity Term *the ſaid* A. B. *came into the Court, and was committed to the* Fleet, *and now he comes and pleads* ut ſupra. *And to this it was ſaid, that he could not have the ſaid Plea now, becauſe by the* Demiſe of the King, *the Plea was diſcontinued and the Bail diſcharged,* &c.

† In *Trinity Term* in the 2d. Year of *Edward* IV. fol. 10.

Billing *affirm'd, that one brought a* cui in Vita, *in the time of the other* King, *and the Tenant pleaded an Entry ſince the laſt conti-*

---

* *Ils fueront a iſſue & ces ſuit le terme de St. Hillarii l'an 39. Roy Henry VI. & le ple fuit diſcontinue per eſchaunge le Roy. Et al terme de Trinite veigne le dit A. B. en Court & ſuis comiſe al flete; & ore il vient & pled ut ſup. Et a ceo fuit dit que il ne poit aver le dit ore pour ces que par le demiſe le Roy le plee fuit diſcontinue, & ceux mainparnours diſcharge, &c.*

† *De Termino Trinitatis anno 2d. Edwardi quarti Fol 10.* Billing *mra comt. un avoit un* cui in vita *en temps l'antre Roy, & le T. avoit pled un ent. puis darr. contin. & dd. judg. de bre. & ſur ceo fuer. a iſſue, & tout puis fuit diſcontinue per demiſe le Roy.*

*nuance,*

*nuance, and demanded Judgment of the Writ, whereupon the Parties were at Issue. But all after was discontinued upon the* Demise *of the* King (that is, King *Henry VI.*)

* Thus after the Dispossession of *Edward* the IV. by *Henry* the VI.

*In* Michaelmas *Term in the 49th Year, from the beginning of the Reign of* Henry *VI. and the first of the Readeption of his Regal Power Fol.* 13.

*In the Court of Common-pleas, it was moved amongst the Judges, where the Parties were at Issue, in the time of the* other *King* Edward *the IVth, and at* Nisi prius *it was found to be put off without a Day by the Demise of the King.* ¶ Littleton *saith that it was adjudged, that were the Parties were at Issue,* &c. *it was discontinued by the* Demise *of the* King, ut supra.

† Thus after the Death of *Richard* the

---

* *Termino Michaelis anno ab incohacione regni Henrici Sexti* 49. *& Recapticnis Regiæ potestatis primo Fol.* 13. *En le comen banke fuit move entre les Justices que l'onentrans les parties fuerunt a issue en temps l'autre Roi Edwarde le quarte & al nisi prius trouve fuit mise sans jour par demise le Roy. Littleton dit que il ad estre adjuge que l'ou les parties fuer. a issue la parole fuit mise sans jour per demise le Roy,* ut supra.

¶ *This was the famous Author of the Book of Tenures.*

† *En quare impedit par le Deane & Vers. & ils fuer à issue en temps le Roy* Richarde *le tierce & discontinue per demisee, le Roy.*

III.

III. in the 1ſt Year of *Henry* VII. Fol. 8. En quare Impedit *by the Dean*, &c. *againſt* &c. *they were at Iſſue in the time of K.* Richard *the III.* &c. *and it was diſcontinued by the* Demiſe *of the* King, (viz. Richard III.)

From all theſe Caſes I obſerve, that as *Edward* the Vth's Judges by allowing the Actions depending in *Edw.* the IVth's Reign were *diſcontinued* by his Death, did thereby acknowledge *his Authority* by which, and *in whoſe Name* the Laws were adminiſtred in his Reign: So when *Edward* the IVth's, and *Henry* the VIIth's Judges, allowed all the Actions and Suits depending in the Reigns of *Henry* the VIth, and *Richard* the III. were *diſcontinued by their Death or Demiſe*, they likewiſe *acknowledged thereby the Authority* of thoſe Two Kings, by which and in whoſe Name the Laws had been adminiſtred in their reſpective Reigns.

But as the Law makes no diſtinction betwixt the Authority of a King *de Jure*, or a King *de Facto* in the Adminiſtration of the Laws, ſo we may hence make this farther Obſervation, That the Law makes no difference betwixt the *Death* or *Diſpoſſeſſion* of a King, when another is in *Poſſeſſion*; but looks on the latter, as well as the former, to be a *Demiſe of the King*, and that without any diſtinction whether it

it be the Diſpoſſeſſion of a King *de Facto* or a King *de Jure*, of *Henry* the VIth, or *Edward* the IVth.

And as the Law puts no difference betwixt the *Death* and *Diſpoſſeſſion* of a King, but makes both to be a *Demiſe*: So from theſe *Caſes* we may in the Third Place obſerve, that by the *Demiſe* of a King, whether *de Facto* or *de Jure*, his Authority is by Law *determined* and at an End, and the Laws thence-forward legally Adminiſter'd by the Authority of the King in Poſſeſſion, and by his Authority *only*.

2dly, From the *Year Books* we may obſerve, that all the Grants, Licenſes, Letters Patents, Gifts, and in ſhort, all the Regal Acts of the Three *Henry*'s of the Houſe of *Lancaſter*, and of *Richard* the III. are pleaded and allowed in all the Judicial Proceedings of *Edward* the IVth's, and *Henry* the VIIth's Courts of Judicature, to be as Valid as if they had been the Grants *&c.* of any of their Progenitors of the moſt unconteſted Titles.

*Bagot*'s Caſe is that which has been uſually urged and debated in this Controverſy; and ſome may be apt to think, this is the only Inſtance that is to be given; but in Truth the *Year Books* furniſh us with abundance of the like Caſes.

*Bagot*'s

*Bagot*'s Case *alone* was cited, I suppose, by my Lord Chief Justice *Coke*, not only because he thought that Case was of it self *Decisive*, but because it was the *only Case* in the Year Books, where the Authority of a King *de Facto* had ever been *disputed*, and yet Judgment given for it; and because several *Points of Law* relating to that Authority were there *maintained*.

The *only* Case, I say, where this Authority had ever been *disputed*, and yet even *then* not disputed at *Common Law*: for the Council against *Bagot* seem'd well enough aware, that the Authority of a King *de Facto* was *good* at Common Law, and therefore what they endeavour'd, was only to Oppose *Henry* the VIth's Authority, and to set aside his Patent of Naturalization granted to *Bagot*, by Implication from the Statute made 1 *Edward* IV. Chap. 1. which declared what Grants *&c.* of the three *Henries* of the House of *Lancaster* should be Valid, and having made no Provision therein to Confirm *Patents of Naturalization*, they would therefore have *Bagot*'s Patent to be *Implicitely annulled* by this Statute.

† Bagot's *Council pleaded, that notwithstanding this Act*; Henry *the* VIth's *Letters Patents of Legitimation are good, because King* Henry *was King in Possession, that it was necessary that the Realm should have a King under whom the Laws should be kept and maintained. Therefore altho' he was in but by Usurpation, yet every Judicial Act done by him concerning the Royal Jurisdiction shall hold good, and shall bind the King* de Jure, *when he returns to the Crown*, &c. *Thus Charters of Pardon, Licenses of Mortmain*, &c. *shall be good. That the King that now is shall have the Advantage of all Forfeitures made to King* Henry VI. *and for a Trespass committed in* Henry VI. *time, the Writ shall run* contra pacem Henrici *VI.* nuper de facto & non de Jure, *and that a Man shall be arraigned for Treason against King* Henry *VI. in compassing his Death, because the said King was not meerly a Usurper, for the Crown was entailed upon him by Parliament, that any Gifts, or Grants, made by King* Henry *which were not to the diminution of his*

† *Pluis d'assise Bagot, ore fuit le matter reherce & touche, q non obstant cet Act, les Patentes de Legitimation sint bones car le Roy* Henry *fuist Roy en possession & il covient q le Roialme eit un Roy seuth que les leys serront tenus & maintein* &c. Anno IX. Ed. IV.

*Crown*

*Crown ſhall be made good.* † *That if he that is now King, had in King* Henry *the VIth's time granted a Charter of Pardon it would be Void now; for every one that ſhall Grant a Charter of Pardon muſt be King in Fact.*

A Learned Perſon, who in a Book * publiſhed ſome Years ſince, oppoſed the Authority of *Bagot*'s Caſe, was miſtaken in tranſlating theſe Words, which he (leaving out the Word *Now*) renders thus, *That if* Edward *the* IV. *in King* Henry *the* VIth's *Reign had granted a Charter of Pardon it would be void, for every one that Grants a Charter of Pardon ought to be King de facto*; and from this Miſtake explains theſe Words to ſignify no more *than that a Pardon granted by a King* de jure *out of Poſſeſſion cannot have its Effect, and be pleaded and receiv'd in Court, whilſt he is out of Poſſeſſion.* Whereas they plainly ſay, that had *Edward* IV. granted a Pardon when he was out of Poſſeſſion, it would be void even *Now*, not only void when King *Henry* the VI. was in the Throne, but even Now when he himſelf is King, and in Poſſeſſion, and therefore is void *in Law*, not void for want of *Power* to enforce it.

---

† *Et fuit dit q. ſi ceſty q. eſt ore Roy en temps le Roy H. uſt fait chart. de pardon ces ſerra void a ore car chſcun q. ſerra chartr. de pardon covient eſtre Roy en fait, &c*

* *The Caſe of Allegiance to a King in Poſſeſſion p.* 16, 24, 25.

It

It was indeed *Bagot*'s Council that urged these Points of Law. But can any Man believe, that in the *Courts of Edward* IV. who had waded through so much Blood to the Throne, and was so jealous of any thing that favour'd the *Lancastrian* Kings; they durst have made this Plea, if they had not known it to be *Law?* Or that the Council on the other side, would not have contradicted, or answer'd it, if they could, as it concern'd their Clients Cause? or the *Judges* have over-ruled it, as they ought, in behalf of the Right of their Prince, by whose Commission they sat, if it had not been *Law?* But as the opposite Council did not deny any of these Points of Law maintain'd in this Plea: So the Judges were so far from over-ruling it, that *Billing*, who was then Lord Chief Justice of the Kings Bench, delivers his Opinion agreeably to it in these Words, *that to every King by reason of his Office* (in which Office he took *Henry* VI. to be invested,) *it belongs to do Acts of Justice and Grace; Justice in executing the Laws, Grace in granting Pardon to Felons, and such a Legitimation as this.* And after consulting with the Judges of the Common-pleas, the Court accordingly gave Judgment for *Bagot*, that is, for the Validity of the King *de Facto*'s Patent, and consequently of his Royal

Juriſdiction, though not confirmed by the King *de Jure*, in a Statute made expreſly for that purpoſe.

I need make no Remarks on the Points of Law maintain'd in this Caſe, they are ſo plain, and the force of them ſo fully, though briefly contain'd in my Lord Chief Juſtice *Coke*'s Notes upon the Words, *Seignior le Roy*, in the Statute of Treaſon, which I ſhall have occaſion to cite afterwards, and therefore ſhall only add the Abridgment of this Caſe, as it is given and recommended with a ſpecial Note by *Brooke* who was Lord Chief Juſtice of the Common-pleas under Queen *Mary*.

* *Nota, Dicitur & non negatur quod de proditione facta tempore Hen. VI. que fuit Uſurper del Crown, le party ſera arraigne pour ceo tempore E. 4. vel hujuſmodi, pour compaſſant le mort de Roy Hen. VI. quod nota, & ſic vide quod treſpaſſe tempore unius Regis poet eſtre puny tempore alterius Regis comment que l'un fuit Uſurper.*

The *Year Books*, as I ſaid, eſpecially thoſe of *Edward* the IV. and *Henry* the VII. abound with Caſes wherein the Authority of Kings *de facto* (of *Henry* the VI. and *Richard* the III. in particular) is fully acknowledged: You may find their Grants indeed ſometimes Diſputed; but then it is in ſuch a manner, as

* *Tit. Treaſon N.* 10.

that

that their Authority is at the same time fully acknowledged. They who would set aside any of their Grants, or oppose some Right that was claimed by Vertue of them, (as of *Richard* the IIId's for Example) did not pretend, no not in *Henry* the VIIth's Courts, where they might safely have done it, if it had been Law, they did not pretend, I say, that *Richard* had not the Regal Authority, and consequently his Grants were void: But they either made exceptions to some legal Defects in the form of the Grant; or pleaded that such a thing did not pass in the Grant; or that King *Richard* the III. was deceived in granting a Reversion, when there was no Reversion, † as may be seen in the Abbot of *Tewkesbury's* Case: In short, they made no other Exceptions, but such as they might have made to the Grants of *Henry* VII. in his own Courts. But if you would be thoroughly convinced of the legal Authority of a King *de facto*, and the Validity of his Acts, I recommend to your perusal some of those Cases in the *Year Books*, which will give you a clearer Idea of it, than you can receive by any short Accounts or Citations from them.

3dly. As all these Judicial Proceedings in the *Year Books* are agreeable to that Maxim

† *See the Abbot of* Tewkesbury's *Case. De Term. Trin. an. 8. Henr. VII. fol. 1.*

of the Law of *England*; *That the Crown takes away all manner of defects and stops in Blood*, which is, I think, Decisive for the Authority of the King in Possession: so the Authority of this Maxim it self, is very conspicuous in the same *Books*, where we read that all the Judges of the Realm, when they were solemnly consulted by the King in Parliament about the Attainder of *Henry* the VII. unanimously deliver'd it for Law, *That the King is a Person able and discharged from any Attainder Eo facto that he takes upon him the Government and is King; and alledged for a Precedent* Henry *the VIth's holding a Parliament in his Readeption, notwithstanding he was attainted, and that Eo facto that he assumed the Regal Dignity and was King, all was void, and there was no need of any Act to Reverse his Attainder.* D. Term. Mich. *an.* 1 Henry VII. fol. 4. *b.*

It is to be observed, that according to the Opinion of all these Judges, whose Judgments, especially when Unanimous, as in this Case they were, make part of the Common Law of the Realm, this Maxim is not to be Restrained to those Kings, who come to the Crown by Proximity of Blood, as some have imagined, but is to be Extended to all Kings in Possession, particularly to such who come to the Crown as *Henry* the VII. and *Henry* the

the VI. did in his Readeption, since to the *former*, the Judges apply this Maxim, and make the *latter*, a Precedent of it.

The last Observation I shall make from the *Year Books* is, that by the Common Law of this Realm, Kings *de facto* are Legislators, or are vested with the Legislative Authority. For in the Year Books of *Edward* the IV. the Statutes of the Lancastrian Kings; and in those of *Henry* the VII. the Acts of Parliament made by *Richard* III. are pleaded as *Statutes* of the Realm of Equal Force and Validity, with those made by *Edward* the IV. and Henry the VII. themselves.

† In the 3d Year of *Edward* the IV. *In the Common Pleas on another Day the writ of forcible Entry sued upon the Statute of the* 8th *Year of* Henry *the VI. was now rehearsed. And the Writ was after this manner rehearsing the Statute, whereas in the Statute of our Lord* Henry *late King in the* 8th *Year of his Reign, Ordaining*, &c.

* *In the* 10th *Year of* Henry *the VII. And the King's Attorny said, that a voluntary*

† *Anno III.* Edward *the IV. f.* 24. *En le commen bank a auter jour le brede* forcible entre *sur l estatute de anno* 8 Henry *VI. fuit rehercee a ore. Et le bred. mis fuit en maner tiel rehercesant l estatut* quare cum in statuo Domini H. nupe: Reg. &c. VIII. *Ordinant.* &c.

* *D. Term. Trin. an.* 10. Henry *VII. f.* 26. *Et le Attourney le Roy dit que Escape Voluntarye si inable fuit Enquirable devant Ju-*

*Escape finable, was Enquirable by the Justices of Peace, by a new Statute in the time of King* Richard *the III.*

*In the* 11th *Year of* Henry *the VII.* † *Nota that it was held in the King's Bench, that if a Man has feoffed,* &c. *It is good by the Statute of* Richard *the III.*

## CHAP. II.

*The* Sovereign Authority *particularly the* Legislative Authority *of Kings for* the time Being, *and their Two Houses of Parliament, acknowledged by the* Statute Law *of this Realm.*

HAving shewn, that the Legislation of Kings *de facto* is own'd to be good at Common Law, own'd in the Courts of succeeding Kings *de Jure*, whose Rivals they were, I need not proceed to any more of their Acts; for when *This*, which is the highest Act of Government, is valid, none of the rest of their Regal Acts can reasonably be

*stices de peace par un Novel Estatute En temps le Roy Rycharde le tiers.*

† *De* Term. Mich. *an. XI.* Henry *VII fol.* 2. *Nota quod fuit tenus in banke le Roy q si homme ad feoffers* &c. *que est bone par 1 estatute R. le III.*

disputed.

disputed. And therefore I shall go on to the next thing I proposed, to take a view of the Authority of Kings *de facto* by Statute Law. And here I shall begin where I ended under the foregoing Head, with the Legislative Power of these Kings; and if I shall make it appear, that Kings *de facto*, as well by Statute Law, as Common Law, have the Legislative Power of this Realm; This Argument will be of it self Decisive, for nothing beneath the Sovereign Power can give Laws to a Community: The Legislative Power being in all forms of Government Essential to the supreme Power (in a Monarchy to the Regal Power) and inseparable from it. And therefore those Words in the dying Patriarch's Blessing, *That the Scepter shall not depart from Judah, nor a Law-giver from between his Feet till* Shiloh *come*, are, as Bishop *Sanderson* hath observed, a Prophetick Description, that his Tribe should be advanced to the Regal Dignity; the Scepter being the known Ensign, and Legislation the Highest Prerogative of Regal Power. Now Kings *de Jure*, and their Parliaments, have Recited the Laws made by Kings *de facto* and their Parliaments, in such a manner, as acknowledges the Validity of their Laws, and Them to be Legislators, of Equal Authority with Themselves, or any of their Progenitors of Undoubted Right.

To this it has been Objected. *That a* King de facto, *as* Richard *the IIId's Acts are Legal, not by the Authority of those that made them, but by the Allowance of subsequent Governments, Lawful Kings and Parliaments, by reciting them in their Statutes, and suffering them to be pleaded in* Westminster-Hall, *have given them the Strength of Immemorial Custom and Common Law. Kings de Jure were willing that* Richard's *Acts should pass for Laws.*

As this Hypothesis is *not supported* by any Authority; so it seems to be a *Stranger* to our Constitution; *Inconsistent* with it self; contrary to fact; and is entirely *confuted* by these Recitals themselves.

It is a *Stranger* to our Constitution, in which Customs are sometimes by Acts of Parliament turn'd into Statute Law; but not Statutes, into Common Law or Custom.

It seems to be Inconsistent with it self; for if Kings *de jure*, by Reciting the Statutes of Kings *de facto*, and suffering them to be pleaded, gave them their Authority; then it is not true, that they received their Authority from Immemorial Custom. And if they acquired their Strength by Immemorial Custom, then they had it not from the Recital and Allowance of these Kings.

Again

Again, That they did not Receive their Authority from the Recital of *de Jure* Kings is evident, in that those Statutes of Kings *de facto*, which are not cited by them, are of Equal Force with those that are.

And if they had received their Authority by the Strength of Immemorial Custom, they would not have been in Force till after a long tract of time, and yet it is certain they were pleaded as Laws in force, some of them in a little time after they were made, and others a long time within the Memory of Man. But in truth, the longest Tract of time will not make that a *Statute* of the Realm, which *ab initio* was no Statute of the Realm; nor will the allowance of Lawful Kings, or their *being willing that* Richard's *Acts should pass for Laws*; make them so if they were not Statutes before, they must be enacted in a Parliamentary way before they can be such.

It is contrary to fact; for as the Laws we are speaking of have been in force ever since they were enacted, so they have always been pleaded in *Westminster-hall*, not as *Immemorial Customs*, but as *Statutes* of the Realm, and been constantly cited in all our Acts of Parliament, not as common Law, but as Statutes of the Kingdom, made by such Kings in their Parliaments holden at *Westminster*, or elsewhere, in such a Year of their Reigns:

Whereas

Whereas when they recite any part of the Common Law they recite it in a very different manner, as the 27 of *Henry* the VIII. Ch. 10. *Whereas by the Common Laws of this Realm, Lands, Tenements*, &c.

But nothing more effectually confutes this notion of these Laws receiving their Authority from being Recited than a View of some of these Recitals themselves, without which we shall but talk without Book. Now the *Manner* in which they are Recited evidently shews, that those Kings and Parliaments did not Recite them to *make* them Laws, or to *Confirm* them, but because they *were Laws already* in force, and for no other reason. 3 of *Henry* the VII. c. 3. Repeals part of the 1 of *Richard* the III. c. 3. which had given Power to one Justice of the Peace to admit Prisoners to Bail, in these words, *Where in the Parliament holden at* Westminster *the first Year of* Richard, *late in deed and not of right, King of* England *the Third*; *It was Ordained, and Enacted, among other divers Acts, that*, &c. *Wherefore the King, with the Advice and Assent of the Lords Spiritual and Temporal, and at the Prayer of the Commons in this present Parliament assembled, That the aforesaid Act giving Authority and Power in the Premisses, to any Justice of Peace by himself be, in that behalf, utterly void and*

*and of none effect, by Authority of this present Parliament.*

We may hence obſerve firſt, that tho' *Richard* is ſtyled *in deed*, and not *of right* King of *England*, yet they acknowledge that he *Enacted Laws*, and that his Acts of Parliament *gave Authority* and Power in the Premiſſes.

2ly, That notwithſtanding there were ſome Abuſes committed under colour of this Law, as *Henry* the VIIth's Statute Recites, yet the Abuſes could not be Redreſſed, nor the Law annulled, but by a *like Authority* of King *Henry* the VII. and his Parliament.

Thirdly, That ſo much of *Richard*'s Statute, as was not Repealed, continued in it's *Original Force.*

21. of *Henry* the VIII. c. 16. Againſt Aliens occupying their Trades, without paying like Charges with others in theſe Words, *where notwithſtanding many good and neceſſary Statutes and Acts of Parliament have been publiſhed, ordained, and made, and eſpecially one in the firſt Year of King* Richard *the III. and the other being made in the firſt year of the Reign of our deareſt Father of Noble Memory, late King of this Realm, and in the* 14th *and* 15th *year of our own Reign concerning Strangers, Artificers, the ſaid Strangers and Artificers*

*Artificers nothing dreading the ſaid Statutes ne the Penalties therein contained*, &c.

Doth *Henry* the VIII. make the leaſt *Difference* in the manner of citing the Statutes made by King *Richard*, and thoſe made by his Father and Himſelf? If we can believe he cited his Father's and his own Laws, in order to confirm them, we may then believe he cited *Richard*'s for the ſame purpoſe. But if he cited his Father's and his own, becauſe they were in *Force already*, he alledged *Richard's* for the ſame Reaſon.

28 of *Henry* the VIII. Ch. 14. Enforces a Statute of King *Richard* the III. againſt ſome Abuſes. *Whereas in the Parliament holden at* Weſtminſter, *in the firſt Year of the Reign of King* Richard *the III. among other things it was eſtabliſh'd and enacted, that* &c. *Nevertheleſs great Deceit is daily uſed in ſelling of Wines and Oyls. For Remedy whereof, it is enacted by the Authority of this preſent Parliament, that the ſaid Statute and all other Statutes made for true gauging and meaſuring of Wine*, &c. *Which Statutes before this time be not repeal'd, or expir'd, ſhall ſtand in their Strength and Virtue, and be put in due Execution according to their Tenor and Effects in every Behalf.*

We may obſerve this Act of King *Henry* the

the VIII. declares, that this Statute of King *Richard*, as well as thoſe other Statutes of King *Edward* the III. *&c.* referr'd to, was not before this time repealed, nor expired, which Words plainly ſignify, that it was in Force *before this time*, and therefore did not receive its *Force* from this *Recital.*

Nor ſecondly, could it receive it's Force from Cuſtom, for the Abuſes it ſeems were ſo great, that *Cuſtom* was rather againſt the Statute than for it.

Thirdly, The Act expreſly ſays, this Statute of *Richard*, as well as thoſe others, ſhall ſtand *in their Strength and Virtue*, which is as much as to ſay, that they had an *Original Strength and Virtue* of their own, derived from their proper Legiſlators, and conſequently not from this Citation.

32 *of* Henry *the VIII. Ch.* 16. *The King our moſt Sovereign Lord calling to his bleſſed Remembrance the infinite Number of Strangers and Aliens.* --- *Remembring alſo the manifold Acts, and good Eſtatutes have been heretofore made, as well by his own moſt noble Progenitors, as by his own moſt Royal Majeſty, for Reformation of the ſame in ſundry and divers Parliaments, that is,* viz. *firſt, in the firſt Year of the Reign of King* Richard *the III. where it was enacted that,* &c. *and whereas alſo in the* 14*th and* 15*th Years of the* Reign

*of*

*of our Sovereign Lord the King that now is, it was enacted that*, &c.

14 of *Car.* the II. Ch. 13. Againſt the Importation of forreign Manufactures, *contrary* (ſaith the Act) *to ſeveral Statutes made in the firſt Year of King* Richard *the III. in the third Year of King* Edward *the IV. in the* 19. *Year of King* Henry *the VIII. and in the* 5*th Year of Queen* Elizabeth. Here we ſee King *Richard*'s Laws put in the ſame Rank, and acknowledged by Two Kings *de jure*, King *Henry* the VIII. and King *Charles* the II. to be of the *ſame Authority* with their own; and will any Man ſay that King *Richard*'s Laws are cited, becauſe they *want Authority*, and *theirs* becauſe they *have Authority?* That *his* Laws are alledged in order to be *made Laws*, and *theirs* becauſe they *are Laws already?* Which is to make the ſame Words, pronounced at the ſame time, and in the ſame Reſpect, to intend the moſt different things in the World, when there is no reaſon to be given, why any of thoſe Laws were cited at all, but becauſe they were Laws in Force antecedent to that Citation.

The Objector confin'd us to *Richard* the III's Laws, becauſe of all our Kings, he'll give up none but him for a King *de facto*. However, we may obſerve, that altho' *Edward* the IV. cites the Statutes of *Henry* the IV.

IV. V. and VI. under the Titles of Kings indeed, and not of right, yet at the same time he owns them to be Legislators, and their Laws to be of *equal* Force and Authority with the Laws of any of his Ancestors, or with his own.

Thus 14 of *Edward* the IV. Ch. 2. Recites at large a Statute made the 9th of *Henry* the V. for the Protection of all Persons, that should go with the said King into *France*, or were there in his Service, from being nonsuited at the Assizes, *&c.* whilst they were absent, which Act was to continue till the first Parliament after the King's Return into *England*. After this Recital King *Edward* the IV. and his Parliament enact, that the same *Order and Protection shall be observed, and be as available for all manner of Persons that should pass into* France *with him, as it was for such Persons which did pass over the Sea, with the said late King* Henry *the V. and that all such Persons as shall now pass over the Sea with our Sovereign Lord the King, shall have and enjoy in every point, all manner of Advantages, as the said Persons to passing over the Seas, with the said late King had, should have had, and might have had, by the said Statute.*

This Act of *Henry the* V. expired at the next Parliament that was holden after his Return,

Return, and therefore could not derive its validity from immemorial *Custom.* And as it expired long before this Recital of it by *Edward* the IV. it could not receive from the Recital that *Force*, which expired before the *Recital*, and yet *Edward* IV. declares the validity of that Statute during the time for which it was made, to be equal to this made by himself, and challenges no more Authority for his *own* Law, than he acknowledges *that* had.

Had Kings *de jure*, saith the Objector, *declar'd explicitely, that a King* de facto *had the same Legislative Authority with themselves, this would have been satisfactory.* So many Kings *de jure* introducing Kings *de facto*, under the same Characters of Legislators with themselves, and their Progenitors; acknowledging *Their* Statutes when they cite them to be of *Equal* Authority with their *Own*, or with those of their Progenitors, is in *truth and effect* the same.

If it should be replyed, with respect to the Statute last cited, that *Henry* the V. was, by the *Submission* of the House of *York*, a King *de jure*, this will not affect the Argument; because he was not so in the Opinion of the Legislator *Edward* the IV. who calls him a King *in deed* and not of *right*, at the same time

time, that he ſo fully aſſerts His Legiſlative Power, as to make his *Own* but *Equal* to it.

Inſtances might be given of Statutes made by Kings *de Jure*, in matters of the greateſt Importance to Government, and where the Prerogative has been concerned, that have been afterwards Repealed by Kings *de facto*, and have ſtood Repealed ever ſince; and no *Authority leſs*, than that which *made*, can *Repeal* a Law. Thus the whole Parliament holden 21. of *Richard* the II. is Repealed 1 of *Henry* the IV. Ch. 3. Thus the Statute of *Richard* the II. which had multiplied the kinds of Treaſon ſtands Repealed by the 1 of *Henry* the IV. Ch. 10. which has reduced Treaſons to the Old Standard of the 25 of *Edward* the III.

Inſtances might be given of Laws made by Kings *de facto* in favour of the Subject, which have afterwards been intrenched on by the Prerogative of a King *de jure*, which *Intrenchment* hath been declared by a King and Parliament *de jure*, to be againſt *thoſe Laws* and Statutes of the Realm. So far is the *Will* of a King *de jure*, or *Cuſtom* from giving ſuch Laws their Authority, that the *Awards and Proceedings of a King* de jure, with ſome *Cuſtom* on his ſide, were not able to controul thoſe *Laws*, but have been de-

 clared

clared *Illegal*, when they have been contrary to them.

How easy is it to give an Historical Account of the Legislative Authority of our Kings, that have reign'd without an Hereditary Title? Were not *William* the I. and *Henry* the I. *&c.* famous Legislators, and yet not Hereditary Kings? No more was *Henry* the III. himself, when he granted the great Charter in the 9th Year of his Reign. And therefore when the Objector would give *the Statutes of Kings de facto*, *the Force of immemorial Customs*, which we see is not true in Fact; may it not be much more truly affirmed, that the Legislative Authority of Kings *de facto* has the *Prescription* of many Ages, has been ever acknowledged in this Realm, thro' all the Successions of our Kings and Queens, and thro' all the Revolutions of Government, not only since the *Norman*, but in the *Saxon* times also? As appears from other Instances, as well as the Authority of *Edward the Confessor*'s Laws, which were held almost sacred, tho' he was no more than a *de facto* King, so that the Authority of such Kings is own'd by our Constitution, and woven into it long before the Statute of the 11 of *Henry* the VII.

As to the *Allowance* which he conceives *was given to* Richard's *Laws, because there was no Claim set up against him.* It may be answered,

answered, if he means an *Allowance* that gave Authority to *Richard*'s Laws, it is pure Imagination, as appears from what hath been already said. Secondly, A *Nonclaim* makes no great difference in his case, as must be own'd by the *Objector* himself, who hath *given him up for a* de facto *Man in the worst Sense*; and worse than that, a *Claim* set up against him, would not have made him. And yet thirdly, this *Nonclaim* seems to be a Mistake, for on the one side *Henry* the VII. when Earl of *Richmond*, put up a Claim against him, as appears from 1 *Henry* the VII. ch. 3. in *Rastal*'s Collections, and when he prevailed against *Richard* in the Pursuit of his Claim, he yet acknowledged the Authority of his vanquish'd Rival's Laws; and on the other side *Edward* the IVth's Daughters fled to Sanctuary, to secure their Titles and their Lives.

I come now to the *Attainders*, upon which I wonder this Gentleman lays so great a Stress, since he cannot believe those Attainders, either *made* or *proved* the Persons *attainted* not to have been *Kings* and *Legislators*, whilst they exercised the Regal Power, when the Instances he himself gives of the mutual Attainders of *Henry* the VI. and *Edward* IV. prove the contrary. For notwithstanding the first Attainder of *Henry* the VI. I know, he acknowledges him to be a King and a Law-giver, and *Edward*

the IV. to have been the ſame in his Turn, notwithſtanding the Attainder, that afterwards paſſed againſt him by *Henry* the VI. And the ſecond *Attainder* of *Henry* the VI. by *Edward* IV. proves no more than the firſt, and leaves the Cauſe entire to be examined by the Merits of it. Not to mention, that *Edward* the IVth's Attainders of *Henry* the VI. were reverſed and annulled, and *Henry* the VIth's † Title reſtored by Act of Parliament in the firſt Parliament of King *Henry* the VII. However, he that owns *Henry* the VI. and *Edward* the IV. to have been Kings and Legiſlators, maugre thoſe ſubſequent Attainders, has no reaſon to draw ſuch a conſequence, as he doth from their Language and Expreſſions which as well as ſome of the Attainders themſelves, ſeem to be Stretches beyond Law, in the Heat of the Victor's Rage againſt his Rival, and are no more to be drawn into Conſequence or Argument, than ſome of the Executions on the Scaffold without Proceſs or Form of Law, in the Bloody Conteſt between thoſe Two Houſes.

And altho' *Henry* the VII. as the *Objector* ſays, in his *Attainder of* Richard *the III. called him only Duke of* Gloceſter. It is certain

† 1 *Hen VII.* 16. Entituled Reſtitutio *N. Henrici ſexti* in the unprinted Rolls.

in

in his ſedater Acts, and after this Attainder, he always gives him the Regal Title, ſtyling him *Richard late in deed, and not of right, King of England*; and all ſucceeding Kings in their Acts conſtantly give him the Title of King of *England*, without that or any Abatement: Nay, in *Henry* the VIIth's Courts of Judicature, as appears from the Caſes I have cited above, and from a great many more I could produce, He is ſtiled King *Richard* the III. without that Addition.

'Tis certain farther, that the *Attainders* of their Perſons did not *diſanul* their Laws (which two Things the Objector ſeems to confound) for *Edward* the IV. owns the Authority of *Henry* the VIth's Laws, notwithſtanding his firſt and ſecond Attainder; and ſo likewiſe would the Authority of thoſe Laws, which *Henry* the VI. made on his Readeption of the Regal Dignity, have been owned, if they had not been Repealed by *Edward* the IV: For theſe Statutes made in the 49 of *Henry* the VI. did not ſink of themſelves, as ſome have imagined, and urged for an Argument; but were Repealed and Reverſed as my Lord Chief Juſtice *Coke* ſays; for *Edward* the IVth's Act doth not *declare* them void, but *ordain and eſtabliſh* them to be void, as may be ſeen in *Raſtall*'s Collections.

This is a sufficient Answer to the Argument against King *Richard*'s Legislative Power, drawn from his Posthumous Attainder, and the Language of it, and which without this Answer would have been no Confutation of those Undeniable Proofs that have been given of his Legislative Authority, from the Acknowledgment of Legislators, whom the *Objector* owns for such. To which may be added two famous Instances more, wherein the *Validity* of King *Richard*'s Laws was own'd in a most solemn Manner by King *Henry* the VII. and that very Parliament that attainted him, as well as by all the Judges of the Kingdom. Of which we have this account in the Year Books.

The first is the Method that was taken by the Advice of all the Judges, for the Reversing *Richard*'s Act of Parliament that had bastardized *Edward* the IVth's Children.

† In Hilary Term in the first Year of *Henry* the VII. *All the Judges in the Exchequer Chamber on the first day of the Term, by the King's Command, consulted about the Reversal of the Bill and Act that bastardized the Children of King* Edward *the IV. and* Eliza-

† *De Termino* Hillarii *an.* 1. Henrici *VII. f.* 5. *Toutes les justices en l'eschecker chamber* 1. *die Termini par le Command le Roy Commincront pur le reverfell del bill & act que bastard les enfans le Roy E.*IV.

beth

beth *his Wife : And took his direction because the Bill and Act was so false and scandalous, that they would not have the Matter, nor the Effect of the Matter recited, but only that* Richard *late Duke of* Gloceſter, *and afterwards in fact, and not of right, King of* England, *caused a false and seditious Bill to be presented to him, which begins thus ---- Pleaseth it your Highness to consider these Articles ensuing, &c. without reciting more, which Bill afterwards in his Parliament holden at* Weſtminſter *was confirmed and authorised, &c. The King, at the special Request and* Prayer *of his Lords Spiritual and Temporal, and the Commons of this present Parliament assembled, and by the Authority of the same, that the said Bill Act and Record be annulled and utterly destroyed, and that it be ordained by the same Authority, that the same Act and Record be taken out of the Roll of* Parliament, *and be cancelled and burnt, and be put in perpetual Oblivion, and also the said Bill with all the Appendancy, &c. * Note that the Record could*

---

*& Eleſabeth son feme. Et pristerent son direction pour ceo que le bill & l'act fuit ceo faux & ſclanderous que ils ne voil retherſe le matter ne l'effect del matter mes tantſolement que Ric jadis Duke de Glouceſter & puis en fact & nient en droits roy d'engle terre fiſt un falx & ſeditious Bill pur eſte mis a luy que Commence ſic Pleaſeth &c.*

** Note enſem que il ne puiſſoit eſtre pris hors del record ſans act de Parlement par le indemnitie & jeopardie de eux que ad les records*

*not be taken off the* Roll, *without an Act of Parliament for the Indemnity of thoſe who had the* Records *in their keeping; but afterwards all was diſcharged by Authority of Parliament.*

The Second is the Order that was taken for Reverſing the Acts of Attainder paſſed by *Richard* the III.

† *In Michaelmas Term in the* 1 *Year of* Henry *the VII. a Queſtion was put to the Judges, what Order ſhall be taken in this Parliament to* Repeal *certain Attainders, foraſmuch as ſeveral Members of Parliament were attainted.* Memorandum, *that on the firſt day of the Parliament of King* Henry *the VII.* viz. *on the 7th of* November, *in the firſt Year of his Reign, the Judges in the Chamber, call'd the* Exchequer *Chamber, agreed,, ihat all*

---

*en lour garde qux fueront aſſente, & puis toutes diſcharges il fuit par auctoritie de parlement.*

† *D. Termino* Michaelis *anno* 1. Henrici VII. *Un queſtion fuit move des Juſtices quel Order ſerra en ceo Parlement de proceder de adnuller certein atteinders Entaunt que pluſours que fueront en le Parliament fueront atteintes.* Memorandum *quod* 1. *die Parliamenti regis* H. VII. *videlicet* 7. *die* Novembris *anno regni ſui* 1. *Juſticiarii in Camera vocata le Eſcheker chamber accorderont que toutes ceux queux*

*thoſe*

*thoſe Perſons who were attainted, and were choſen Knights of the Shires, or Citizens, or Burgeſſes to this Parliament, that this Act of Attainder ſhall be firſt repealed, and annulled; and that the attainted Perſons themſelves ſhall not be in Parliament at the Reverſal of the Act, and forthwith, when the Acts of Attainder againſt them ſhall be reverſed and annulled, that all and every one of them, that is to ſay, the Lords and Commons ſhall come and take their Places, and then proceed legally, and as legal Perſons. For thoſe that are attainted, cannot be legal Judges. And then a Queſtion was put, what ſhall be ſaid for the King himſelf, ſince he is attainted alſo; and after conſulting to-*

---

*fueront atteintes & fueront nomes chevaliers des counties ou citizens ou Burgeſis a ceo Parlement que ceo act de atteinder ſerra primes revoke & adnulle. Et que eux meſmes atteintes ne ſerrount en le Parlement at reverſell de l'act, & tantoſt come les actes de atteinder vers eux fuerout reverſes & adnulles que eux toutes & cheſcun de eux ceſt aſſaver Seignours & comeynes viendrount en leur lieus & donques procedount loialement & per loyals parſons, qar il neſt convenient que ceux que ſount atteintes ſerront loiales juges; Et donques fait move un Queſtion que ſerra dit pour le Roy meſme pur ceo q. il fuit atteint, &*

*gether,*

*gether, they all agreed, that the King is a Perſon able and diſcharg'd of any Attainder* eo facto, *that he takes the Regal Dignity upon him, and is King.* Townſend *ſaid that King* Henry *the VI. upon his Readeption, held his Parliament, notwithſtanding he was attainted, and the Attainder not reverſed. And the other Judges ſaid, that he was not attainted, but diſabled from his Crown, Kingdom, Dignity, Lands and Tenements: and ſaid, that* eo facto, *that he aſſumed the Regal Dignity and was King, all this was void.* And ſo *in this Caſe the King can Enable himſelf, and has no need of any Act to reverſe the Attainder.*

Here are Acts of Parliament made by *Richard*, which the *Objector* will eaſily grant

---

*puis Communication ewe entre eux tous accorderont q. le Roy fuit perſon able & diſcharge daſcun atteinder eo facto que il priſt ſur luy l'reign & eſte Roy. Townd. dit que le Roy* H. VI. *en ſon readeption ſeignoit ſon Parlement, & uncore il fuit atteint & ne fuit reverſe. Et les autres juſtices diſoient que il ne fuit atteint mes diſable de ſon Coron reigin dignite terres & tenements, & diſoient que eo facto que il priſt ſur luy le royalle dignite il eſte Roy que tout ceo fuit voide, & iſſint icy que le Roy puit luy meſme Enable & ne beſoign aſcun act de le reverſell de ſon Atteinder.*

that

that *Henry* the VII. *was not willing should pass for Laws*; and yet the Validity of these Acts was acknowledged, not only by all the Judges of the Realm, but also by the King and Parliament, who accordingly passed an Act to reverse them, before the Persons attainted could sit in Parliament.

These Acts of Attainder subjected the Persons attainted, to the Penalties of *High Treason*, tho' that Treason was nothing but conspiring, or bearing Arms against the late King, when in possession, for the Service of the King, who was now on the Throne: And yet the *Judges*, who had the Administration of the Laws, under the present King, were so far from acquitting them of this *Treason*, that they declar'd they were not *legal* Persons, and therefore subject to the Penalties of it, till a *new Law* was made to relieve them.

Had King *Henry* the VII. and his Parliament, had the same Notion of a King *de facto*'s Acts, which this Gentleman hath, they would never have put the Question to the Judges *What Method should be taken in Parliament to reverse Richard*'s *Acts of Attainder*; or had the Judges known any thing of this Notion, and been perswaded it was *Law*, they would have answer'd in this Gentleman's Language, *that* Richard *was not* le Roy, *but only Duke of* Gloceſter, *that he had*

*no*

*no Right to send out Writs for Elections, and by consequence the Two Houses being illegally convened, could have no Authority to vote and pass Bills; and having not the Legislative Authority, their Acts of Attainder, as well as all their other Acts, were so many Nullities.* That to repeal them, and for the Persons attainted not to take their Places in Parliament, till their Attainders were repealed, would be to acknowledge the *Validity* of his Acts and his Legislative Authority.

And truly, considering how odious *Richard* had rendred himself to the whole Nation, to the Friends of the House of *York*, as well as to those of the House of *Lancaster*, and what a mortal Hatred *Henry* the VII. bore to him, and his Memory; considering he was now safe in his Grave without Posterity, or Friend left behind him to revenge his Quarrel; and considering the very Reversal of these Attainders, was, as my Lord *Bacon* observes in his History of *Henry* VII. *a tacit Reflection on the King's Party*, the Judges were, without doubt, well enough disposed to have given, and the King and Parliament to have received such an *Answer*, if the *Constitution* would have born it; nay, they could have given *no other*, if they had had the same Notion of the *Constitution*, which this Gentleman hath.

But

But how different is the *Answer* which they gave? An *Answer* which expresly and fully own'd the *Validity* of King *Richard*'s Laws, and his Legislative Power, *viz.* That the Acts of Attainder, pass'd in King *Richard*'s Parliament, must be repealed by King *Henry* the 7th's Parliament; and that not *ex abundanti Cautelâ*, but because the Persons attainted by King *Richard were not legal Persons, nor could sit in Parliament, untill their Attainders were reversed.* And there can be no reason given for this unanimous *Resolution* of all the *Judges* of the Kingdom, and of the Proceedings of the *King* and *Parliament*, perfectly *agreeable* to it, but that they all knew, the *Constitution* required it.

The *Resolution* of the *Judges* is as remarkable upon the other *Question*, that was put concerning the King himself, who was likewise atttainted: *That the King is a Person able and discharged of all Attainders and Disabilities ipso facto, that he assumed the* Regal *Dignity and was King.* Of which I need say no more here, having already made a remark upon it, except it be that this Maxim of the Law has not only the *Authority* of the *Judges*, but also of the *King and Parliament*, who proceeded agreeably to it, in not Reversing the Attainder of the King, when they Reversed those of the Subjects: And by the way it furnishes

shes us with a new Argument for the Legislative Authority of the King for *the time being.*

Thus we see by the Repeal of the Act, which bastardized *Edward* the IVth's Children, that *Richard*'s Acts *affected those*, who by Proximity of Blood, had a better Title to the Crown than himself. His Acts are owned to be *valid* against the Heirs of the House of *York*, as well as that of *Lancaster*; in short, against *every Person*, but the Person who *became King*, after he became so, and then they were all *ipso facto* void.

But had the Lady *Elizabeth* assumed the Regal Dignity, instead of *Henry* the VII. this Act of *Illegitimation*, need not have been reversed, no more than *Henry* the VIIth's Attainder: For as his Attainder *was*, so her *Illegitimation* would have been, *ipso facto* void, had she been *Queen*.

Thus the Act that illegitimated Queen *Elizabeth*, was never reversed, by Sir *Nicholas Bacon*, the Lord Keeper's Advice, founded on this antient Maxim of the Law, that the *Crown entirely takes away all manner of Defects*, † as *Camden* relates it in the History of that Queen.

† *Jurisprudentia Anglica jam olim pronunciarat Coronam semel susceptam omnes omnino defectus tollere.* Camden p. 10.

But

But besides the Consequence, that immediately follows from this Resolution of the Judges, and the Parliament's Proceedings thereupon, it furnishes us with a new Answer, to the Argument drawn from the Attainders pass'd against *Henry* the VI. and *Richard* the III. for if an *Antecedent* Attainder will not affect the Prince attainted, in the Exercise of the Regal Power *subsequent* to it; then certainly a subsequent *Posthumous* Attainder, cannot affect a Prince's *Past Exercise* of the same Regal Power.

It may not be amiss here to take Notice of another Objection, which is, that these Princes sometimes attainted some of the Leaders of the opposite Party, for adhering to their Rivals. But when they did this, their *constant* way of proceeding against such Persons was, by Attainders in Parliament *ex post facto*, and not by Indictments in the ordinary Course of Proceedings; which shews, I think, at the same time, that to serve the King in Possession was not a Fault, nor could be punished as such, by the Laws that were then in *Force*. But to serve *against him*, was, insomuch that 1 *Henry* the VII. ch. 6. a Pardon was enacted in Parliament, to indemnify those, who fought on his side against *Richard* III. Those who fought for the King for *the time being*, wanted no Act of Parliament to

indem-

indemnify them, nor had they any. King *Henry* the VII. indeed to quiet their Minds, paſſed a Pardon for them under the great Seal. But thoſe who fought againſt the King in Poſſeſſion, tho' in Purſuit of *Henry* the VIIth's Right, as it is worded in this Act, did not think themſelves ſafe, till they had their Pardon paſſed in Parliament for it.

There is indeed no mention of Treaſons in this Act of Pardon; no more is there in that of the 1 of *Edward* the III. or the 1 of *Henry* the IV. which were Acts paſſed for the Pardon of thoſe, who fought for *Edward* the III. againſt *Edward* the II. and for *Henry* the IV. againſt *Richard* the II. and ſeem to have been Precedents for this Act of *Henry* the VII. However, we have ſeen, that the Perſons who were attainted of Treaſon, for joyning with *Henry* the VII. againſt *Richard* the III. did, in the Opinion of all the Judges, remain under thoſe Convictions of Treaſon, and ſubject to the Penalties thereof, even after *Henry* the VII. was in Poſſeſſion, till their Attainders were reverſed by Authority of Parliament.

But now on the other ſide, did the King in Poſſeſſion, or his Parliament, or the Parties concerned, ever think an Act of Pardon was wanting for thoſe who fought for Him, againſt a Perſon out of Poſſeſſion, whatſoever

ever Title he had, or pretended to have? Can there be one Inſtance given of this, in all our Laws or Hiſtory?

## CHAP. III.

### *The moſt material Objections to the* Legiſlative Authority *of theſe Kings anſwered.*

AN Objection has been made, to the Legiſlative Authority of Kings for the time being, from the 1 of *Edward* the IV. ch. 1. which declares what *judicial Proceedings* of the *Three Henries* ſhould ſtand good. The Objection is, that *ſome Acts of Parliament, relating to the Town of* Shrewſbury, *and to the founding of ſome religious Houſes, are there confirmed*; whence they inferr, that *the reſt were in the ſame Condition, and wanted the like Confirmation.* But ſince the numerous Acts of Parliament, that were made by thoſe Kings, during the Space of Threeſcore Years, have been always held valid, tho never confirm'd; they ought to have made an Inference directly contrary, That thoſe *Acts* relating to *Shrewſbury*, and ſome Religious Houſes, tho confirm'd, (thro' the Caution probably, & at the Deſire of thoſe that were concerned in them,) did not however ſtand in need of that Confir-

mation, any more than all the other Acts of those Three Reigns, which have been valid, and (except such as have been repeal'd) are *valid* at this Day, tho' never *confirmed*.

So likewise from *Bagot's* Case, it has been made appear, that those Judicial Proceedings, and Regal Acts of the *Three Henries*, which were not confirmed by the aforesaid Act of *Edward* the IV. were yet in his own *Courts*, held as *good* and *effectual*, as if they had been confirmed by him.

Others say, that the Laws of Kings *de facto* are suffered to continue, because they are, or may be, for the publick Good.

How then came such Laws as were not *beneficial*, to continue in force? And yet we see that the Laws of Kings *de Facto*, which have been found inconvenient, and against the publick Good, have continued in *Force*, till they were repealed, as well as their most *Beneficial* Statutes. And as for their Laws, that were for the publick Good, if they were not Laws by Virtue of the Legislative Authority of those that made them, the suffering them to continue, will not make them so. They must, as I have said, all be *enacted*, or *confirmed*, in a *Parliamentary way*, before they can be Laws. These Persons, I believe, will not say, that the publick Good will make Laws, least it should be made to serve

some

some other Purposes, which they are not willing to allow. It is indeed for the publick Good, that *Good Laws* should be continued, but not upon an *illegal* and *defective Authority*, for that would be a publick Mischief. Nor is there any Necessity for it: *One* Act of Parliament made (for Example) by *Edward* the IV. would have been sufficient to have *confirmed*, all the *beneficial Statutes* of the Three *Henries*, and to have *declared* all the rest *void*: And there can be no reason given, why Kings *de jure* never did this, but because they knew, they were valid without it.

Having mentioned the Statute of 1 of *Edward* the IV. ch. 1. where we *first* meet with the famous Distinction of Kings *in deed*, and *not of right*, give me leave to repeat an Observation, I have made already, that *before* this time, tho' *others* pretended a better Right to the Throne, than the Persons that possess'd it, yet they never assumed the *Regal Title* against the *Regnant* King, nor did the Constitution ever know any other King, but the *King* that possessed the Throne.

And since the Kings of the House of *Lancaster*, had been Sixty Years in Possession of the Kingdom, and the Heirs of the House of *York*, had almost all this time liv'd as *Subjects* under them, without setting up any

Claim; *Obey'd* their Summons to Parliament; and taken *Oaths* of Allegiance to them, particularly *Richard* Duke of *York* (who was the firſt of that Houſe, that put in his Claim to the Crown,) it muſt be own'd that the *Lancaſtrian* Kings, at leaſt *Henry* the Vth, and VIth, were not only *in deed*, but *of right* Kings of *England*; and therefore I may obſerve in the ſecond place, that the *firſt time*, this Diſtinction of Kings *in deed*, and not *of right*, was ever *uſed*, it was *miſapplied*.

Thirdly, That althio' *Edward* the IV. calls the Three *Henries*, no more than *Kings in deed*; yet he doth not *now* pretend that his Anceſtors were Kings of *Right*, during the time the Three *Henries* were Kings in *deed*.

Laſtly, it may be obſerved from what has been ſaid, that, even ſince the time this Diſtinction has obtained, the *Sovereign Authority* of the Engliſh Government, as well *Legiſlative* as *Executive*, hath been ever acknowledged, both by our *Laws*, and *Lawyers*, to be lodged in the King *for the time being*; and the Allegiance of the Subject to be due to him, and to him *alone*.

It is objected farther, that when *Richard* Duke of *York*, put in his Claim in † Parliament in the 39 of *Henry* the VI. The Lords up-

† *Parl. Roll. 39. H. 6.*

on

on hearing the Cauſe betwixt the King and him, declared, that *his Title could not be defeated.*

In anſwer to this Objection, we muſt take Notice, that altho' the Lords knew well enough the Duke of *York*'s Pedigree, yet they ſay, *this matter was ſo high, and of ſuch Weight, that it was not for any of the Subjects to enter into Communication thereof, without the King's high Commandment, Agreement, and Conſent had thereto.* Whereupon they go to the King, who being not able to help himſelf, gave way to their hearing of the Cauſe, betwixt Himſelf and the Duke. After this, the Lords order the Judges, to offer what they could in Maintenance of the King's Title, who excuſe themſelves, ſaying *It hath not been accuſtomed to call the Juſtices to Counſel in ſuch Matters, the Matter was too high, and toucht the King's high Eſtate and Regaly, which is above the Law and paſſed their Learning, wherefore they durſt not enter into any Communication thereof, for it pertained to the Lords of the King's Blood, and the Apparage of this Land to have Communication and meddle in ſuch Matters.* If the Judges excuſed themſelves from medling with the King's Title, as a Matter too high for them, whoſe Office was only to adminiſter the Laws under him: And if the Peers would not under-

take to judge of the King's Title, without his Leave first obtained, tho' considering his Condition, this Application might perhaps be little more than Complement in them, and the King's leave only the Effect of the force he was under; yet from what the *Peers* did, as well as what the *Judges* said, it follows, that, according to their Opinions, to judge, or over-rule the Title of the Regnant King, must be much above the Sphere of *private Subjects*, and what no Government ever allowed. The Peers, after they heard what the Kings Attorney, and other Council could offer, for their Master's Title, declared, *That the Title of the Duke of* York, *could not be defeated.* Which how *partial* soever, was sufficient, after the King had submitted his Title to the Judgment of Parliament, to conclude private Subjects *then:* But has never been esteemed of Force to over-rule subsequent *Parliaments*, much less to justify *private Persons* to *over-rule* the Title of a Regnant Prince, and the Decisions of Parliaments *in their own times*, when they once have declared who has *Right*, *and who* has not *Right*, *in a disputed Succession.*

It is not without reason, that I have called this a *Partial Declaration:* For during the Space of 60 Years, that the H. of *Lancaster* had sate in the Throne, we never heard of such a Title in the House of *York*, as could not be defeated

ted till *this time*, when the King's Army was *first defeated*, the King himself a *Prisoner*, and the Parliament, tho' call'd in the Kings Name, yet not by *his*, but the *Duke of* York's *Order:* And when the Debates were awed with the Presence of a Victorious Prince, it is no Wonder that they ended in a Declaration, That *his Title could not be defeated.*

Otherwise they might have declared, upon the *Principles* of the Gentlemen, with whom we are disputing, That the Title of the *Duke* of *York*, not only *could be*, but *actually was* defeated by his long *Submission; by obeying Summons* to Parliament; and *by Oaths of Allegiance* to King *Henry* the VIth. particularly that which he took in the 29 Year of his Reign, in these Words, *I* Richard *Duke of* York, *confess, and be known that I am, and ought to be humble Subject and Liege-man, to you my Sovereign Lord King* Henry *the VI. and owe therefore to bear your Faith, and Truth, as my Sovereign Liege Lord; and shall do always to my Lives End,* &c. *I never shall any thing attempt by way of feat, or otherwise, against your* Royal *Majesty and Obeysance that I owe thereto,* &c. †

They must, I say, acknowledge the Duke of *York's* Title was defeated upon their

† *See this Oath at large in Stow p.* 395.

own Principles: for when they are preſs'd with the Commands of Holy Scripture, *To render to* Cæſar *the things that are* Cæſars, *&c.* They think it a ſufficient Anſwer, to ſay, that *Tiberius Cæſar* was a *Rightful* Governor. And when it is demanded, how he acquired a *Right* over the Roman Senate, and People, or the Romans a *Right* to the Government of *Judæa*; They reply by the *Submiſſion*, and *Oaths*, of the Roman Senate and People, to *Tiberius*; and the like Submiſſion of the Jews, to the Romans. Let us then borrow their own Principles and Anſwers, and apply them to the preſent Caſe. Had not the Heirs of the Houſe of *York*, as well as all the People of *England*, lived longer in *Subjection* to the Kings of the Houſe of *Lancaſter*, when this Declaration was made; than the Senate and People of *Rome*, had to *Tiberius*, and *Auguſtus* together, when our Saviour gave this Command? Have we not more *certain Evidence* of the Oaths, which *Richard* Duke of *York* took to *Henry* the VI. than we have of the *Truth*, of the *Lex Regia*, of the Romans, or of any Act of *Reſignation* of the Regal Family of the Jews? And was not the forementioned Oath of *Richard* Duke of *York*, a more full *Recognition* of *Henry* the VI. *Right* and *Renuntiation* of his own Right; than the Oaths of the Jews, were to the Romans, or the Oaths

of

of the Romans, to *Tiberius?* If all this be true, as it is, they must then confess, the Duke of *York*'s Right was *defeated*, and *Henry* the VI. was a *rightful* King. If they will not, they must *never more* say, that the Rights of the Jews, and of the Roman Senate, were *defeated*, or that the Roman Emperors were *rightful* Governors. And so they will lose more, than they could gain by this Denial, and will be hard put to it for a Plea, to justify their own Practice against those Positive Commands of Scripture, that enjoyn Subjection.

But if these Gentlemen will abide by their own Answer, they must then acknowledge the Duke of *York*'s Title was *defeated* upon their own *Principle*, notwithstanding this *Declaration* of Parliament: And so notwithstanding the same, might be defeated, as it *actually* was (tho' the Lords durst no more assert this, than the other) by the *Legislative Power* of the Realm, which had settled the Crown in the House of *Lancaster*. In short they must acknowledge this Declaration of Parliament proves *too much*, and therefore proves *nothing* at all.

Lastly, this Declaration of the 39 of *Henry* the VI. as well as the Acts of the 1 of *Edward* the IV. were repealed and anull'd by Act of Parliament, when *Henry* the VI. recovered his Throne: And altho' *Edward* the IV. forced him

him from it again, and attainted him; yet *Henry* the VII. in the first Year of his Reign, passed an Act of Parliament, wherein it is enacted, *that all Acts of Attainder, or Disablements, against the late King* Henry *the VI. to be void, annulled, and repealed*, &c.* So that the Force of all the former Declarations, and Acts of Parliament, against *Henry* the VI. is taken off by this last Act of Parliament, which restores his Title.

Lastly, It is objected, that the Confirmation of the Judgment of Parliament against the two *Spencers* 1 *Edward* the III. was repealed in the 21 of *Richard* the II. because it was unlawful his Father *Edward* the II. being then alive, and a *Prisoner*.

This Act of Confirmation of the Judgment against the Two *Spencers* 1 *Edward* the III. was not *declared void* in the 21 of *Richard* the II. but *repealed*, and therefore *valid*, until repealed.

Secondly, That Repeal of the Judgment against the Two *Spencers*, and the whole Parliament, (as I have already observed) of the 21 of *Richard* the II. in which it passed, was afterwards Repealed 1 *Henry* the IV. c. 3. Of all these Acts of Parliament relating to the two *Spencers*, My

* *Rot. Parl.* 1. *H VII. N.* 16 *Restitutio. H. VI.*

Lord

Lord Chief Juſtice *Coke*, gives this brief Hiſtorical Account.

*The Judgment of Parliament in* 15 *of* Edward *the II. againſt the* Spencers *was in the ſame Year by Act of Parliament Repealed. That Repeal was* Repealed *by Authority of Parliament* 1 Edward *III. That* Repeal *of* Edward *the III. was* Repealed, 21 *of* Richard *the II. and that of the* 21 *of* Richard *the II, was Repealed by Authority of Parliament in the* 1 *of* Henry *the IV. and ſo the Judgment againſt the* Spencers *ſtands in force*, ſaith *Sir* Edward Coke, † ſo that this is ſo far from being an Objection, that it is a Proof of the Sovereign Legiſlative Power of a King *de facto*, and his Parliament; ſince they can repeal Acts, paſſed in Parliaments, holden under Hereditary Kings.

Thirdly, All the other Acts of Parliament that were made in the 1 of *Edward* the III. whilſt his Father was alive, were ever held for Laws of the Realm, and one of them cited as ſuch 16 *Charles* the I. c. 16. about the Boundaries of Foreſts. *Whereas by Act of Parliament made in the* 1 *Year of the Reign of King* Edward *the III.* &c.

Since therefore the Authority of Kings for the time being is ſo fully owned by Hereditary Kings and their Parliaments, owned in the higheſt Act of Government, in their Le-

† *Inſtitu.* Pt. 4. c. 1. p. 25.

giſlation :

giſlation : Ought not this to conclude all Private Subjects ? Can they diſown this Authority, without oppoſing their Private Sentiments to that, which themſelves acknowledge to be the ſupreme Authority, and Judgment of the Kingdom.

Secondly, Since the Kings for the *time being*, with their two Houſes of Parliament, have the Legiſlative Power, they muſt alſo have the ſupreme Power, the former being, as I have ſaid, always Eſſential to, and inſeparable from the latter. And therefore they can make any Laws, and do every thing that is within the Verge of that Power, for the Safety of the Kingdom, and of themſelves.

Laſtly, If the King, for the *time being*, hath, both by the Statute and Common Law, the Legiſlative Power of this Kingdom; then the Obedience of the Subjects, is due to his Laws ; and their Allegiance, which is no more than Obedience according to Law is due to his Perſon.

CHAP.

## CHAP. IV.

*The* Allegiance *of the Subject due to the King, for the Time being, by the* Statute Law *of this* Realm. *With an Answer to the most considerable Objections.*

BUT the Allegiance which is due to the King in Possession, doth not only follow by consequence, from his being invested with the Legislative Power, but we have *express Statutes* for it. The first is the Statute of *Treasons* in the 25 of *Ed.* III. *c.* 2. Which Statute declares what Offences shall be adjudged Treason. And we have the Opinions of Two great Lawyers, my Lord Chief Justice *Coke*, and Lord Chief Justice *Hales*, (and no great Lawyer's Opinion, as far as I know, to the contrary) that by our *Sovereign Lord the King*, in this Statute, against whom these Offences are Treason, *is to be understood only the King in Possession of the Crown and Dignity, though he be* Rex de facto, & non de jure.

And truly, if we consider, that this Statute did not make *new Species* of Treason, but declare and fix those by *Statute*, which were before Treason at *Common Law*; and if we consider farther, that of the *Eleven* Kings

that

that reigned from the Conqueſt, to *Edward* III. there were no leſs than *Eight*, who were Kings *de facto*, ſome through their whole Reigns, others in the beginning thereof, one of which Number, was *Edward* III. himſelf; and yet by the *Common Uſage*, or *Law*, of the Kingdom, thoſe Offences in the Statute, had always been eſteemed *Treaſon*, and puniſhed as ſuch, when they were committed againſt thoſe *Eight*, as well as againſt the *Three* Hereditary Kings: We may conclude, that as *Edward* the III. and his Parliament intended to declare thoſe Offences *Treaſon*, which were ſo before by *Common Law*, or Uſage; ſo by King in the Statute againſt whom theſe *Offences* ſhall be adjudged Treaſon, they muſt intend the King, againſt whom they were held to be Treaſon before, by *Common Law*, or *Uſage*, which was always the *Regnant King*, altho' without an Hereditary Title, eſpecially when the *Legiſlator* himſelf *Edward* III. was *no other*, in the Beginning of his Reign.

But we ſhall eaſily be determined to this Senſe, if we conſider farther, that from the Conqueſt to *Edward* the IIId's Reign, and for a 100 Years after, the Diſtinction of King *de facto*, and King *de Jure* was not known; but the *Regnant King* was the *King*, and there was no *other* King but *he*. There were often

ten others, that pretended a better Right to the Throne, than the Prince that was in Poſſeſſion of it, and formed Alliances, and raiſed Armies to recover it. Thus *Robert*, the eldeſt Brother, ſet up his Claim, firſt againſt *William Rufus*, and afterwards againſt *Henry* the I. *Maud* againſt King *Stephen*: *Arthur* againſt King *John*: But in the mean time, they contented themſelves with the Titles of Dukes of *Normandy*, &c. None of their Friends *gave* them the *Regal Title*, nor did they themſelves *aſſume it* (no not the Heirs of the Houſe of *York* ſome Ages after) againſt the King in Poſſeſſion of the Throne and Kingdom, who alone was eſteemed the *King*. And therefore, as thoſe *Offences* only were *declared* Treaſon, by this *Statute*, which were ſo by the *Common Uſage*, and *Cuſtom* of the Realm: So by our *Lord the King* in this Statute, muſt be intended the *King in Poſſeſſion*, ſince by the *Common Cuſtom* and *Uſage* of the Kingdom, He was the *King*, and there was no *other* King but *he*. Unleſs any one will run into ſo great an Abſurdity, as to ſay, that for the greateſt Part of the time from the Conqueſt to *Edward* the IIId's Reign, *England* was a *Monarchy*, without a *Monarch*; and there was *Allegiance* and *Treaſon*; but no *King* to whom one was *due*, and againſt whom the *other* might be *committed*.

Since

Since therefore *Treason*, can be committed only against the *King in Possession*, and the Constitution knows no other King but him, *Allegiance* can be due *only* to *him*. For *Treason*, which is the highest Violation of *Allegiance*, can be committed against none, but him, to whom *Allegiance* is due.

And so I come to the famous Statute of the 11 of *Henry* VII. c. 1. This Act hath lain under a great Prejudice, as if it introduced a *new Authority*, and a *new Allegiance*, not known before in our Constitution. But if a Law, that is made in Civil Matters, needed a Vindication, this is sufficiently vindicated by the foregoing Discourse, which hath proved, that the Authority of the King, for the time being, which this Statute secures, was ever acknowledged; and the Allegiance, which it declares to be due to him, was ever *paid* in this Realm, and both the *one* and the *other* justified by the *Common Law* and *Statute Law* of the Kingdom, in the Reigns of Hereditary Kings. So that this Act, is so far from being a *Breach* upon our Constitution, that it is *agreeable* to it. And therefore is drawn in such a manner, as made only in Affirmance of what was lawful before, for immediately before the enacting Words

Words, it is expreſly affirmed, and declared *that it is not reaſonable, but againſt all Laws, Reaſon, and good Conſcience, that the Subjects, attending upon the King for the time being, in his Wars, or being in other Places by his Command, any thing ſhould loſe, or forfeit*; and the reaſon given for this, is becauſe, ſays the Act, this is *doing their true Duty and Service of Allegiance*; and then it follows, *be it therefore ordained, enacted*, &c. In the enacting Part alſo, this Service and Obedience, *to the King for the time being*, is again ſtiled, the *true Duty of Allegianee.*

This Law never appears with ſo great Advantage, as after ſuch a view, as we have taken of the Legal Authority, of the *King for the time being*; for it's Conformity to the Conſtitution, is a ſufficient Anſwer to the Objections, that have been urged againſt it. However, it may not be amiſs to give a more particular Anſwer, to the moſt conſiderable of them.

Firſt, they have objected to the *Authority* of the Legiſlator *Henry VII.* as not being a King *de Jure.* Were this true, we have ſeen that the *Kings for the time being*, have ever been *own'd* for *Legiſlators* in our Conſtitution, and neither Common Law, nor Statute Law, do *make*, or allow any difference to be *made*, betwixt the Legiſlative Power of a King *de*

*Jure*, and a King *de facto*. But a Learned Gentleman, who in his Remarks on this Statute, made this Objection, has since acknowledged that *Henry* VII. was a *Rightful* King. Indeed in his own, or his Wife's Right, he had all the Titles that could be to the Crown.

2ly, It has been objected, that this Act doth only *indemnify* the Subjects, for serving the King for the time being. It doth not indemnify them in that Sense, as to *indemnify* signifies, to exempt them from the Punishment due to a *Crime*; but as it signifies, to save them *harmless* for doing their *Duty*, if a Competitor should get the Throne; and to indemnify them after this manner, is to *justify* them: As the Act truly doth, by expressly declaring, *that to serve the King for the time being, is their true Duty and Service of Allegiance*; nay, the Act further declares, *it is against all Laws, Reason, and good Conscience, that the Subjects should lose, or forfeit any thing for serving the King for the time being*; whereas were it a *Crime*, it would not be contrary, but *agreeable* to all these that they should suffer for it.

3dly, It has been farther objected, that this was a *Temporary* Statute, design'd only for *Henry* the VIIth's Reign. May we not make any Law, when it doth not serve our Hypo-

Hypotheſis, Temporary as well as this? Is there any Expreſſion, or Word, that determines our Allegiance to any particular *Perſon* or *Time*? What can be more *indefinite*, than the King for the *time being*, which reaches to *all* Kings of this Realm, and *all times*? Beſides what the Law requires, the *true Duty and Service of Allegiance*, is not *Temporary*, but muſt laſt as long as Government laſts. And what the Law provides againſt, it declares, as I obſerv'd before, to be *contrary to all Laws, Reaſon, and good Conſcience*; and therefore the Law, was deſign'd to be of *perpetual* Obligation; unleſs *Reaſon, and good Conſcience* are *Temporary* Things.

4thly, Another Objection has been formed upon the Duke of *Northumberland*'s Caſe, who was condemned for commanding an Army againſt Queen *Mary*, notwithſtanding his Plea, that he acted by a Commiſſion from the Lady *Jane Grey*, under the great Seal. Which ſhews they had no regard to this Statute of *Henry* VII. ſince that Lady was Queen *de facto*.

It is to be obſerved firſt, That Queen *Mary* in a Letter She writ to the Lords of the Council Notifyed her Claim, and Required them upon their Allegiance, to Proclaim Her Title at *London*: That this Letter was Deliver'd to the Lords, not on-

ly before they had Proclaim'd the Lady *Jane*, but before they had Publiſhed King *Edward*'s Death, or ſo much as acquainted the Lady *Jane* with their Deſign, to ſet Her up to ſucceed Him, as appears both from the Biſhop of *Sarum*'s Hiſtory of the Reformation, and Dr. *Heylin*'s. The latter has printed this Letter at large, in which there is a Paſſage that would induce one to believe, that She had been proclaimed ſomewhere, before She writ it.

But not to inſiſt on this, I obſerve ſecondly that the Duke of *Northumberland* did not plead this Statute, nor indeed had he any Right to it. For being the Principal Author of this Revolt, he was by the laſt Clauſe of this Act, cut off from any Benefit of it. This Act was made for the Security of thoſe, who ſubmit to a *King for the time being*, after he is eſtabliſhed; not for thoſe that overturn Governments, who whatever they may plead for themſelves, it can never be the 11. *H.* VII.

Laſtly the Lady *Jane* was never ſettled in the Throne, but fell whilſt the Duke of *Northumberland*, and his Faction, were ſtrugling to thruſt her into it againſt her own, as well as the Nation's Senſe. Her Government was but in *fieri*, ſhe was not Queen *de facto*, She was no *Lawful* Queen, (as the Judges implyed in their Anſwer to that Duke.) For She had no conſent of the Eſtates, no Recognition by

Act

Act of Parliament, as all those Kings have had, whose Regal Authority has been own'd by the Laws, without an Hereditary Title; and therefore has had no Place allow'd her, in the Succession of the Kings and Queens of *England*. This, by the way, may serve for a sufficient Answer to another Objection, that is drawn from the 1. *M. c.* 4.

## CHAP. V.

### *An Objection from the Act of Recognition the* 1. *Jac. I. answer'd.*

IT is objected, that the 11 of *Henry* the VII. is virtually repealed, by the Act of Recognition, 1. of *Jac.* I. which declares, and enacts, that the Crown Descended on King *James* the I. by *inherent Birthright, as the next and sole Heir, of the Blood Royal of this Realm*, and then they desire the King to *accept this, as the first Fruits of their Loyalty to his Majesty, and to his Royal Progeny and Posterity for ever*,

I answer first, that it is not pretended by those who make this Objection, that the 11 of *Henry* the VII. is expressly repeal'd by this, or any other Law. Nor is there any Reason to believe the Legislators design'd to repeal it by this Act of Recognition. For since the

Parliament knew that the ſupreme Authority, both Legiſlative and Executive, of the *Kings for the time being*, had ever been acknowledged at Common Law in the Courts of Judicature, and by the Acts of Parliament, of Hereditary Kings: That the Subjects of *England*, had always ſworn and paid Allegiance to the King in Poſſeſſion: And that a Statute of the Realm expreſly requir'd this, and that the Crown, during this time, notwithſtanding this, was held to be Hereditary: Since the Legiſlators, I ſay, knew all this, if they had deſign'd to have alter'd the Conſtitution, and laid a new obligation on the Subject, never to ſubmit to any but hereditary Kings; It had been abſolutely neceſſary for them, to have declared, and enacted, that the Subjects ſhould never hereafter ſwear, or pay Allegiance to any but Hereditary Kings; that no Statutes, for the time to come, ſhou'd be valid, but ſuch as were made by them; and that the 11 of *Henry* VII. ſhould be repealed and annulled: But ſince nothing of all this was done by them, it is evident, they had no deſign to do it. It is ſufficient for us, they have not done it: For a Conſtitution is not to be alter'd; the whole Courſe of the Common Law to be inverted; and Statutes of the Realm repealed by Implication, and that Implication no better, than an ill-grounded Conjecture.

Indeed

Indeed this Notion, of a virtual Repeal, ſeems to proceed upon a double Miſtake, Firſt, That the 1. *James* the I. hath made the Deſcent of the Crown, more Hereditary than it was before Secondly, That the 11 of *Henry* the VII. can have no Place in an Hereditary Kingdom. Whereas it is certain the Crown was Hereditary, before this Act of Recognition, as well as ſince, as might be proved from ſeveral Teſtimonies, if there needed any more than this Act of Recognition it ſelf, which recognizes King *James* the Iſt's Title to the Crown, as *being rightfully, lineally, and lawfully deſcended of the Lady Margaret, &c.* So that this Act is only declarative of the old Hereditary Right, and not introductive of any new Right, and without any Alteration, leaves the Conſtitution as it found it. And therefore ſince the Crown was Hereditary before the 1. *James* the I. when the Objectors confeſs the 11 of *Henry* the VII. was in force (otherwiſe they could not ſay, it was then virtually repealed) they muſt alſo grant, that the 11 of *Henry* the VII. may have Place in an Hereditary Kingdom.

2ly, That it may, and actually had Place in ſuch a Kingdom, in the Judgment of a King and Parliament, is evident, from their Acts: For after the Crown had been entailed

in the 1st Year of *Henry* the VIIth's Reign, on the Heirs of his Body, can we believe, that he designed by this Act of the 11 of his Reign, to break the Hereditary Succession of his own Children? Undoubtedly he did not: And therefore he and his Parliament did believe, that a Law which required the Allegiance of the Subjects to the *King for the time being*, might have Place in an Hereditary Kingdom; and so the 11 of *Henry* the VII. is as consistent with the Hereditary Act of the 1 *James* the I. as with the Hereditary Act of the 1. of *Henry* the VII: and the 1 *James* the I. is no more a virtual Repeal of the 11 of *Henry* the VII, than the 11 of *Henry* VII, is a virtual Repeal of the 1 of *Henry* the VII.

Wherefore as the 11 of *Henry* the VII. was not design'd to interrupt the Descent of the Crown, but to provide for the Peace of the Community, and the Security of the Subject, if the Hereditary Succession should happen to be interrupted: So the 1 *James* the I. which was to secure the *antient Succession*, was not design'd, in case that failed, to take away the *antient Provision*, which had been made for the Preservation of the Community, and the Safety of the Subject.

The Distinction is very obvious, betwixt our advancing one that is not the next Heir

to

to the Throne, and ſubmitting to ſuch a one when he is advanced, and poſſeſs'd of it. The firſt is unlawful by the 1 of *Jac.* I. and ſo it was before; and the latter is as lawful ſince that Act, as it was before; ſeeing that Act doth not meddle with it. The utmoſt, I think, that can be inferr'd from the 1 of *Jac.* I. is, that it is a Direction, and Obligation, on the States of the Realm, and on the Subjects upon the Death of the King, to recognize the next Heir (tho' the Word *Heir* is not expreſs'd in the Act, when they ſpeak of King *James's* Poſterity.)But ſuppoſe the States ſhould miſtake the next Heir, or ſhould place another in the Throne, or another ſhould thruſt him into it, and they Recognize him for King; (as the Legiſlators knew had been often done:) Doth this Act ſay the Subjects ſhall ſubmit to none, but the next Heir? or ſhall none ſubmit to him that poſſeſſes the Throne, as they knew they had always done? No ſuch thing. Does it direct them what to do in this Caſe? Not that neither: And therefore it leaves them to that Courſe, which had been ever held through all ſuch Revolutions of Government in this Realm; A courſe which had been warranted by the higheſt Authority in it; and which was afterwards enacted into a Statute, under King *Henry* VII. and not yet

yet repealed, but continues a Part of the Law of this Kingdom.

The Lawfulneſs of ſubmitting to a Prince, whom it was Unlawful to ſet up, may be illuſtrated, and proved, from the Conduct of God's own People, to whom he had given a Law, *Deut.* 17. 15. *To ſet one from among their Brethren to be King over them, not to ſet a Stranger over them, which was not their Brother:* This made it unlawful for any Jew to contribute to the advancement of a Stranger to the Throne; and yet when Strangers got the Rule over them, they conſtantly ſubmitted to them, without any cenſure for it; and when ſome of them made a Scruple of it in our Saviour's time, our Lord juſtified them, in their Submiſſion to the *Stranger* that then ruled over them, the Heathen Emperor *Tiberius*.

Thirdly, It is acknowledged by ſome of thoſe who make this Objection of a *virtual* Repeal, that notwithſtanding this Act of Recognition, 1 *Jac.* the I. the Succeſſion of the Crown may be limited by the Legiſlative Power; and ſince I have proved that the *Kings for the time being, with their Two Houſes of Parliament, have the Legiſlative Power; and are acknowledged* to have it by Kings *de jure* and their Parliaments, even ſince

the

the 1 of K. *James* I. it undeniably follows, they can, notwithstanding the so often mention'd Act, transfer the Right of Succession, and the Allegiance of the Subject with it, from the Next to a Remoter Heir, which cannot be deny'd, without transgressing a Rule allowed by all Laws, † without distinguishing (where the Law makes, nor allows any Distinction to be made) betwixt the Legislation of a King *de jure*, and of a King *de facto*; without pulling our legal Constitution to pieces, which has the Legislative Power of such Kings *woven* into it; and without opposing, as I have often said, their private Sentiments to that, which they themselves confess to be the publick Judgment, as well as the supreme Authority of the Kingdom.

In the mean time, these Persons know there are others, who concur with them in disallowing the 11 of *Henry* the VII. but do differ however with them in the other Point, and deny, that the Limitation of the Right of the Crown, is within the Verge of the Legislative Power: and when they are press'd with the Statutes, made in the Reign of *Henry* the VIII. which impower'd him to limit the Descent of the Crown, and the 13 *Eliz.* c. 1. which *makes it High Treason during the Queen's Life, and Forfeiture of Goods and Chattels after her Death, to say that an Act of Par-*

† *Ubi lex non distinguit, neque nos distinguere debemus.*

*liament*

*liament is not of sufficient Force to limit and bind the Descent of the Crown:* They argue from the 1 of *Jac.* the I. in the same way, and think it a sufficient Answer to say, that *those Laws of King* Henry *the VIII. and Queen* Elizabeth *were virtually declared null and void, or virtually repealed by the* 1 *of* James the 1. The Persons to whom I address this Argument do, I know, look on this Answer to have no Foundation. But I desire them to consider, what better Foundation they themselves have for their *virtual Repeal* of the 11 of *Henry* VII. by the 1 *Jam.* I. than the former have for their virtual Repeal of those Statutes of *Henry* VIII. and Qu. *Eliz.* and to consider withal, how easy it is by virtual Repeals, to erect our selves into Legislators, and repeal as many Laws as we do not like. It is but to force a Consequence from a subsequent Law, and to say the Preceding Laws are not consistent with this Consequence, and are therefore virtually or consequentially repealed by it.

But this way of arguing is no where less allowable than in *Acts of Recognition*, in which Parliaments have ever been very liberal of their Expressions, as may be seen in the Act of Recognition of *Richard* the III. and those of Queen *Mary* and Queen *Elizabeth* compared together. So that we ought not to draw Conse-

quences

quences from them, beyond the Expreſs Letter of the Law; much leſs ought we to go about by ſuch Conſequences to alter the Conſtitution, and repeal Laws, which the Lawgivers never intended to Repeal. There is no more reaſon to believe K. *James* the I. and his Parliament, did deſign by this Act of Recognition, to Repeal the 11 of *Henry* the VII. than Queen *Elizabeth* and her Parliament, did by the Act of Recognition in the firſt of her Reign, which runs in very high Terms, declares *her lineally, rightfully, and lawfully deſcended of the Blood Royal of this Realm*; and then they oblige themſelves, and their Poſterity for ever, to the Queen and the *Heirs* of her Body, (whereas the 1 of *James* the I. is in more general and looſer Terms to his *Royal Progeny and Poſterity for ever.*) And yet, whilſt this Act of Recognition was paſſing in Parliament, it was debated, whether they ſhou'd not Repeal the Statute of King *Henry* the VIII. which had declared the Queen Illegitimate, as Queen *Mary* had before Repealed, ſo much of it as concerned herſelf. But this, as I have taken notice before, was judged to be unneceſſary by the Lord Keeper *Bacon* (and the Queen and Parliament acquieſced in his Judgment) upon this Maxim, *That the Crown entirely takes away all manner of Defects.* So that in the Judgment of the Legiſlators, this Maxim

of

of the common Law of *England*, which is Equivalent to the Statute of the 11 of *Henry* the VII. has Place in an Hereditary Kingdom. And therefore we have no more reason to believe, that King *James* and his Parliament, did by the Act of Recognition, design to abolish this Maxim of the Law, or Repeal the 11 of *Henry* the VII. than Queen *Elizabeth* and her Parliament, who acknowledged it, at the same time, that they enacted the Crown to be Hereditary in as High Terms at least as King *James* and his Parliament.

This Act of Recognition, which declared Queen *Elizabeth* rightfully, lineally, and lawfully descended of the Blood Royal of this Realm; was, one would have thought, a virtual Repeal of that Act of her Father, which made her illegitimate; but the Parliament knew so little of virtual Repeals, tho some lay so great a Stress upon them, that they passed an Act, to restore the Queen in Blood, to her Mother: For tho' the Crown took away all defects as she was Queen; yet as she was the Grand-daughter of the Earl of *Wiltshire*, she must be restored in Blood, to be capable of inheriting the Estate of that Family.

To conclude against this imaginary Repeal of the 11 of *Henry* the VII. by the 1 of *James* I. The greatest Lawyers in the Kingdom have declared, since that Act of Recog-

nition,

nition; That Allegiance is due to the King in Poſſeſſion, and have ſupported their Opinions by the Eleventh of *Henry* the VII. and therefore did not believe it repealed by the 1 of *James* the I.

It has been ſaid that the Oaths of Allegiance Enjoyn'd in the Beginning of K. *Jam.* I. Reign, was form'd on this Act of Recognition, and has tyed the Subject more ſtrictly to the next Heir, than he was tyed before.

But this is a Miſtake, for 1ſt the Oath of Allegiance was made in the 3. K. *J.* I. on the Occaſion of the Gunpowder Plot, for the Diſcovery of Popiſh Recuſants; and the Additions which are in it, to the former Oath of Allegiance, were all of them levelled againſt ſome Popiſh Tenets. And as for the Word *Heirs*, to which the Subject was ſworn in that Oath, it is no Addition, but was in the old Oath of Allegiance, that is extant in *Britton*, who wrote under *Edward* the I. and was taken by the Subjects in the Court Leets, ſeveral Hundred Years before King *James* I. Reign: So that the Oath of Allegiance framed in his Reign, makes no Alteration in this Matter.

---

† *Sheringham* of the Kings Supremacy. *p.* 18.

CHAP.

## CHAP. VI.

*This Account of our Constitution, and Laws, supparted by the Opinions and* Authorities, *of some of the greatest Modern Lawyers, who lived in the Reigns of Hereditary Kings. And the Case of the* Oaths *resolved, from this Account of our* Legal Constitution.

WE have already had the Opinions of the Lawyers, and Judges of *Elder Reigns*, for the Authority of the *King for the time being*, in their Judicial Proceedings, Adjudged Cases, and in the unanimous Resolutions, which they have given, when they were consulted by the King and Parliament, in those Deigns, where that Authority was least likely to be favour'd. I will now produce the Opinions of the Lawyers of *later Reigns*, and of such only as lived *since* the Act of Recognition made in the 1 of *James* the I. whereby we shall see, that they knew nothing of this imaginary virtual Repeal of the 11 of *Henry* the VII. by that Act of Recognition: And be convinced at the same time, that the greatest *Modern* Lawyers have entertained the same Notion of the Constitution, which the Ancient had; perfectly agreed with them in this great *Point* of Law, concerning the *Authority* of

of the King in Poſſeſſion, and the *Allegiance* of the Subject which is due to him; and that the foregoing Diſcourſe is ſupported with their Authority.

I begin with my Lord Chancellor *Bacon*, who in his Hiſtory of *Henry* the VII. ſpeaking in Praiſe of the Statute, made in the 11th Year of his Reign, which ordained, that no Perſon ſhould be impeached, or attainted, for aſſiſting in Arms, or otherwiſe, *the King for the time being*, ſaith, *That it was agreeable to Reaſon of State, that the Subject ſhould not enquire, into the Juſtneſs of the King's Title, or Quarrel, and it was agreeable to good Conſcience, that whatſoever the Fortune of the War was, the Subject ſhould not ſuffer for his Obedience. The Spirit of this Law was certainly pious, and noble, being like in Matter of War, unto the Spirit of* David *in Matter of Plague, who ſaid, if I have ſinned, ſtrike me; but what have theſe Sheep done?* Hiſt. H. VII. p. 241.

The Lord Chief Juſtice *Coke*, in his Comment on the 25 of *Edward* the III. ch. 2. the Statute of Treaſons, ſaith, *This Act is to be underſtood of a King in Poſſeſſion of the Crown and Kingdom, for if there be a King Regnant in Poſſeſſion, though he be* Rex de facto, *and* non de jure, *yet he is* Seignior le Roy *within the Purview of this Statute: And the other*

*that has Right, and is out of Poſſeſſion, is not within the Act: Nay, if Treaſon be committed againſt a* † *King* de facto, *and after the King* de jure *cometh to the Crown, he ſhall puniſh the Treaſon committed, againſt the King* de facto. *And a Pardon granted by a King* de jure, *that is not alſo* de facto, *is void.* Inſt. part. 3. p. 7.

The Lord Keeper *Bridgeman*, in the Trial of *Cook* the * Regicide, *The laſt thing you have ſaid for your ſelf is this, that admitting there was nothing to be conſtrued of an Act, or an Order, yet there was a Difference. It was an Act* de facto, *that you urged rightly upon the Statute of the* 11 *of* Henry *the VII. which was denyed to ſome. God forbid it ſhould be deny'd you. If a Man ſerve the King in the War, he ſhall not be puniſh'd, let the Fact be what it will. King* Henry *took care for him who was King* de facto, *that his Subjects might be encouraged to follow him, to preſerve them, whatever the Event of the King was, Mr.* Cook, *you ſay, to have the Equity of that Act, that here was an Authority* de facto, *theſe Perſons had gotten the ſupreme Power, and therefore what you did under them, you do*

† 11 *H. VII. Bagots Caſe, 9 Ed. IV.*
* *Tryal of the Regicides, p.* 146.

*deſire*

*desire the Equity of that Act. For that clearly the Intent and Meaning of that Act is against you, it was to preserve the King* de facto, *how much more to preserve the King* de jure. *He was owned by these Men and you, as King, you charged him as King, and you sentenced him as King. That that King* Henry *the VII. did, was to take care of the King* de facto, *against the King* de jure. *It was for a King, and Kingly Government; you proceeded against your King, your own King, and as yet King, and called him in your Charge* Charles Stuart *K. of* England. *I think there is no Colour you should have any Benefit of the Letter, or of the Equity of the Act. They had not all the Authority at that time, they were a few of the People that did it, they had some part of the Army with them; the Lords were not dissolved then, when they had adjourned for some time, they did sit afterwards, so that all the Particulars you alledge, are against you.*

The Lord Chief Justice *Hales*, in his *Pleas of the Crown*, in the Chapter of *High Treason*, says as follows,

*What a King?*

First, *A King before his Coronation, a King within this Statute, when the Crown descends upon him.*

Secondly, *A* King de facto & non de jure, *a* King *within this Act, and a Treason*

*againſt him puniſhable, tho' the Right Heir get the Crown.*

Thirdly, *a Titular* King *that is not Regnant, as the Huſband of the Queen, not a* King *within this Statute.*

Fourthly, *The right Heir to the Crown, yet not in Poſſeſſion, therefore is not a* King *within this Act.* †

Had I given the Opinions of Lawyers, of how great Name ſoever, that lived ſince the Revolution, they would have been received with Prejudice. It might have been ſaid, they had too great an Intereſt in the Caſe, and could not have come to the Bench, or the Bar, without this Doctrine; and therefore I have produced none * but ſuch as lived in the Reigns of Hereditary Kings, where there was not the leaſt Temptation, to *byaſs* them on this ſide of the Queſtion. The Temptation lay on the other ſide, it being no good way to make their Court, but more likely to bring themſelves into Diſgrace, with thoſe Princes by whoſe Commiſſion, and in whoſe Courts they ſate; to declare in Effect, that if another

† Pleas of the Crown, 1 Ch. of Treaſon, *p.* 11. 12. Licenſed by the Lord Chief Juſtice *Rainsford.*

* The firſt, Lord Chancellor; and the ſecond, Lord Chief Juſtice of both Benches in the Reign of King *James* the I. The third, Lord Keeper; and the fourth, Lord Chief Juſtice of the King's Bench, in the Reign of King *Charles* the II.

Perſon

Perſon got the Throne, who had no antecedent Right to it, he would be to all Intents and Purpoſes, as much a King as themſelves, or their next Heirs; and the Allegiance of the Subject, would be due to him, and not to them. And therefore nothing but a *full Conviction*, that this was the *Law* of the Realm, could induce them, to *declare it* ſuch.

And as theſe great Lawyers delivered this for Law, ſo no Lawyer of Note, that I know, has contradicted them, no not in *thoſe* Reigns, when they might have done it with *Safety* and *Advantage*: So that were this Caſe *doubtful*, as, I think, it is not, the *unanimous Opinions* of great Lawyers, and Judges, of former, and later Reigns, Men of Probity, eminent in their Profeſſion, and under no Temptation to be corrupted, is a *ſafe* and *legal* Reſolution of this Caſe.

I have ſaid a *legal* as well as ſafe *Reſolution*; for the Judges by their *Office*, have Authority to interpret the Laws, and their Judgments judicially given are *Law*. So that if what *Grotius* ſays, † *That the Interpretation of the Force, and Obligation of an Oath, whereby Subjects are bound to the Civil Magiſtrate, belongs to*

† *Tam vero ſuper vi jurisjurandi, quo Cives Magiſtratibus obligantur, interpretationem Politicorum & Juriſconſultorum eſſe arbitror non Theologorum. Votum pro pace, p. 63.*

*Statesmen, and Lawyers, and not to Divines*, be true in the general; it is still of greater Force in our Constitution, where the Judgments of Judges, as I said before, especially when they are unanimous, are *Law*.

From what hath been said, the *Case* of the *Oaths* will easily be resolved. For the *Oath* of *Allegiance*, is a *Legal* Oath, or an Oath appointed by *Law*; and the *Allegiance* we swear, is a *Legal Allegiance*, or that *Allegiance*, and no other, but that, which the *Law* requires: And therefore, as the *Law* is the *Measure* of our *Allegiance*, so is it of the *Extent* and *Obligation* of our *Oath* of Allegiance. And the Law, by requiring our *Allegiance* to be paid to the King *in Possession*; *determines* our Allegiance, and consequently puts an end to the *Obligation* of our *Oaths*, to the Prince that is *out of Possession*. So that here is no danger of taking Contrary Oaths, since the *New* Oath was not Enjoyn'd before the Obligation of the *Old* Oath ceased.

In *Promissory Oaths*, all Casuists agree, there is this tacit Condition, *rebus sic stantibus*; and what is thus implied in the Oath, is supplied, and expressed in our *Laws*, by which the Oath is to be *interpreted*.

And since the *Kings for the time being*, with their Two Houses of Parliament, have by our Constitution, the Legislative Power,

they

they are enabled to do, whatsoever is within the Verge of that Power, for the Preservation of the Community, and themselves. In particular, they can by Virtue of the Supremacy of their Power, (which cannot be bound by any prior Law, or Settlement; for then the *supreme* Power, would be *superior* to its self) cut off, and extinguish old Rights, and create, and establish new *legal Rights*, and *Titles*, not only to private Inheritances, but to the Crown it self: The Right of the Crown having ever been, and by several *Statutes* of the Realm, expressly declared to be, under the Direction of the Legislative Authority. So that, whosoever stands excluded by the Legislative Authority, whatsoever they may have had, have now no longer any Right, or Title, to the Crown; and they, on whom the Crown has been settled in Reversion, as it has been on the Queen, will be, in the Possession of it, as her Majesty now is *rightful* and *lawful* Kings, or Queens of this Realm. *Right* being nothing but a Conformity to Law.

## CHAP. VII.

*Our Laws in this* Point *not* contrary *to the* Holy Scriptures *and the* Doctrine *of our* Church, *but rather* agreeable *to* Both.

SOme will be apt to say, that in all this Discourse, I have gone no higher, than the

*Conſtitution*, and *human Laws*; but is this ſufficient to ſatisfy *Conſcience*? Yes, in matters of Civil Obedience, of which *human* Laws are the *Meaſure*, ſo long as there is nothing therein contrary to the *Law* of *God*. When our *Bleſſed Lord* was upon Earth, He *ſubmitted* to the Government under which he lived, made no *Alteration* in Matters of Government, but *left* the Governments of the World as he found them. In his Holy Goſpel, and the Writings of his Apoſtles, we have Commands given us in general *to render to* Cæſar, *the Things that are* Cæſars; *To obey Magiſtrates*; *To be Subject to the higher Powers*; but we are left to learn, from the Laws of our Several Countries, who theſe *Magiſtrates*, and *higher Powers* are, to whom we are to be Subject: And this without doubt is the Reaſon of *Grotius*'s Rule, *That the Interpretation of the Obligation of the Oaths, taken to the Civil Magiſtrate, is the Province of Stateſmen and Lawyers, not of Divines*: becauſe the *former*, are generally better acquainted with the Laws of their Country, than the latter. What the Goſpel adds in this Matter, is to ſet our Duty upon a higher Principle, by enjoyning us to pay for *Conſcience ſake*, that Obedience which human Laws exact, for *Fear* of Puniſhment.

The

The Constitution therefore, and our Obedience according to it, is sufficiently vindicated, if there is nothing in it, *contrary to the Law of God*; for then the Laws of the Kingdom (which the Divine Law commands us to obey) do bind our Consciences as Subjects, and we are not only warranted, but *obliged* to pay our Allegiance, as the Law directs.

But we may venture a Step farther, and affirm, That our Constitution, by requiring Allegiance to be paid to the King in Possession, is so far from being *contrary*, that it is *agreeable* to the Holy Scriptures, as appears from our Blessed Saviour's Resolution of the Case, that was put to him, *whether it was Lawful to pay Tribute to* Cæsar *or not?* He bad them *shew him the Tribute Mony*, and only ask'd them *whose Image and Superscription is it?* (i. e. who is in Possession of the Government?) And when they answer'd him *Cæsar's*, he immediately determines, *Render therefore to* Cæsar, *the things that are* Cæsars, *&c.*

Here it will be answered, that *Tiberius Cæsar* was a *Rightful* Emperor, the Senate, and People of *Rome*, having conferr'd the whole Authority, of the Roman Government on *Augustus*, by the *Lex Regia*. If we grant the *Lex Regia* to be genuine (which hath been denied

denied in a Tract, *De fictione Legis Regiæ*,) since it is spoken of with so much Assurance, by the Emperor *Justinian* in his *Institutes*: yet what is this to *Tiberius*'s Title? the *Lex Regia* did not entail the Empire on *Augustus*'s Posterity; and if it had, *Tiberius* was none of them. And if we look into the first Book of *Tacitus*'s Annals, we shall see, that he durst not, upon *Augustus*'s Death, lay any Claim to it; but by Fraud (of which he was a great Master,) and Force, he wound himself into the Government, and the Submission of the Romans (such as it was) was his only Title.

But were the Romans themselves Rightful Governors of *Judea*? The Law given by God, *Deut.* 17. seems to have been a fundamental Bar to the Right of any Heathen to govern the Jews, and was probably the ground of this Question, which the Pharisees put to our Saviour. And tho' the Jews, had generally submitted to the Roman Government; for the Law, that prohibited them to *set* up a *Stranger*, to rule over them, did not, as I observed before, prohibit them to *submit* to a Stranger, when he had by Force set himself over them: However, there appears no Express Act of the Resignation of the Sovereign Power to the Romans, like that of the *Lex Regia* Conferring the Sovereign Power on *Augustus*: Nothing but a forced Submission

to

to a Superior Power, which many of them ſtill ſcrupled; and the generality of the Nation, were in the mean time in Expectation, that a Prince of the Tribe of *Judah* would ſhortly break the Roman Yoke, and reſtore the Kingdom to *Iſrael*.

But not to inſiſt on this, let it be granted, that *Tiberius* was a Rightful Governor of the Roman Empire in general, and of *Judea* in particular; This will not weaken the Argument, that is drawn from our Saviour's Reſolution of the Caſe. For our Saviour, doth not reſolve the Lawfulneſs of their Subjection to *Cæſar*, into his *Right* to the Government of *Judea*, but into his *Poſſeſſion* of it; the Coining of Mony and raiſing of Taxes, which our Saviour lays down for a ſufficient *Ground* of their Subjection, being no manner of proof of the *former*, but an undeniable *Sign* of the *latter*.

And this is the Opinion of the Learned *Grotius*, as he has deliver'd it, in three ſeveral Books, written at different times, which ſhews it was the Reſult of his moſt deliberate Thoughts.

† In his *Votum pro Pace*, he ſaith, *And if any one in our time, had ſhew'd our Mony, and ask'd whoſe is this Image? Any Man,*

† *Et ſi quis noſtro tempore numnum oſtendiſſet, & quæſiſſet, Cujus hæc eſt Imago? quilibet & doctus & indoctus reſponſurus fuit, Ordinum Hollandiæ. Ego omnes qui nunc in illis terris vivunt ſentio Obe-*

*both*

*both the Learned, and the Unlearned, would readily Answer, The States of* Holland's. *I think all that live now in those Territories do owe Obedience; nay, and if they are injuriously treated, patient Submission to those, who are now the Governors of the Towns and the People: For they are in Possession of the Government.*

* In his Admirable Book *de Jure Belli & Pacis*, he saith, *Especially in a controverted Case, a private Person, ought not to take upon himself to judge, but to follow Possession. Thus Christ commanded Tribute to be paid to* Cæsar, *because the Mony had his Image, that is, because he was in Possession of the Government. This being* (as he says in his Note) *the most certain Sign of Possession.* †

In his Annotations on the 22. c. of St. *Mat.* Explaining the Words. *whose Image and Superscription is this?* * In the 20*th* verse he

---

*dientiam, imo & si quid mali ipsis inferatur, patientiam debere iis qui nunc sunt oppidorum populorumque Rectoribus: Sunt enim in Possessione Imperii. Vot. pro pace p. 62.*

* *Maxime autem in re controversa, judicium sibi privatus sumere non debet, sed possessionem sequi. Sic tributum solvi Cæsari Christus jubebat, quia ejus imaginem nummus præferebat, id est, quia in possessione erat Imperii, De Jure B. & P. l. 1. c. 4. § 20.*

† Quia ejus imaginem nummus præferebat ] *certissimum hoc Indicium possessionis. vide in Historia Genuate Bezarum l. 18.*

* v. 20. Τίνος ἡ εἰκὼν αὕτη καὶ ἡ ἐπιγραφή; *Sicut legem figere signum est summi Imperii, ita & nummum cudere, nam νόμισμα, ut docet Aristoteles, & nomen suum, & vim habet ἀπὸ τοῦ νόμου.*

says,

says, *As to make Laws, so to coin Mony is a Mark of Sovereign Power; for* νόμισμα *Mony as* Aristotle *teaches, receives both it's Name and Value from* νόμος *the Law; hence to adulterate the Coin is ranked amongst Treasons. — The Mony it self therefore receiving it's Value from the Edict of* Cæsar, *and bearing* Cæsar's *Image and Superscription, declared, that* Cæsar *actually possess'd the Sovereign Power over* Judea, *and that the Jews in using the Mony acknowledged it. It might be objected, that the Romans had the Rule over the Jews, and* Cæsar *over the Romans in fact, but not of Right. But Christ shews this doth not at all belong to the Question: for since the Peace of Nations, cannot be maintain'd without Arms, nor Arms without Pay, nor Pay without Taxes, as* Tacitus *speaks, it follows, that Tribute must be paid to him that governs, as long as he governs, as a Reward of the common Protection, which he*

---

*Hinc Majestatis criminibus accensetur nummos corrumpere. Ipse igitur nummus pretium habens ex Edicto Cæsaris, Cæsarisque nomen & vultum præferens, testabatur Cæsarem summum in Judæam Imperium reipsâ obtinere, idque à Judæis nummo illo utentibus agnosci. Objici poterat, ipso quidem facto Romanos Judæis, & Cæsarem Romanis imperâsse, at nullo jure. Sed Christus ostendit hoc ad propositam quæstionem nihil pertinere. Nam cùm nec quies gentium sine Armis, nec Arma sine Stipendiis, nec Stipendia sine Tributis, haberi possint, ut loquitur Tacitus, sequitur ei qui imperat, tantisper dum imperat, pendenda tributa, ut pretium communis tutelæ, quam præstat nobis quisquis est publici imperii possessor. Propterea inquit Pau-*

affords

*affords us, who is in Poſſeſſion of the Government, whoſoever he be. Therefore, ſaith St.* Paul, *you pay Tribute alſo, and not only out of Fear of Puniſhment, but in regard to Juſtice and Equity; becauſe under the Protection of the Powers, ye live ſecure from Violence and Injuries.* † *Render* (*as due*) *as St.* Paul *explains it, who, when he was treating of Tribute, ſubjoins, render therefore to all their Dues.*

It is not my Deſign here, to examine thoſe Texts of Scripture, nor the Argument from *Providence*, which has been drawn from them, and ſo much debated in this Controverſy: how far, and in what manner, the *Divine Providence* is concern'd, in the Revolutions of States and Kingdoms; and how far it will, or will not juſtify Subjection, after the Revolution is paſt, and the new Government eſtabliſhed. But without entering into this Diſpute, after the View that I have given of the Conſtitution, I may take the Liberty to ſet the Controverſy on a *new* Foot, and without incurring the leaſt Suſpicion, of committing Providence with Law, propoſe this

---

*lus, etiam tributa penditis nec ſola pœnæ formidine ſed juris & æqui reſpectu, quia poteſtatum præſidio tuti eſtis à vi atque injuria.*

† v. 21. Ἀπόδοτε, *tanquam debitum, ut Paulus explicat, nam cum de tributis egiſſet, ſubjicit,* ἀπόδοτε οὖν πᾶσι τὰς ὀφειλάς.

ſingle

ſingle Queſtion: That after the *divine Providence* has placed, permitted, at leaſt, a Perſon to be placed in ſuch a Station, that the Laws of the Kingdom acknowledge his Regal Authority, and require the Allegiance of the Subject to be paid to him; Whether to refuſe to acknowledge him, for our King, or to pay Allegiance to him as ſuch, is not to oppoſe both *Providence* and *Law*?

From the holy Scriptures, I come to the Judgment of our Church, as it may be collected from the Homilies. I do not pretend, that the Church has given her Judgment, by way of an expreſs Deciſion of this Queſtion; only that there are ſome Paſſages, to be met with there, which plainly favour that ſide of the Queſtion which we maintain; of which I ſhall here mention but one.

In the Sixth Homily againſt Rebellion, we have theſe Words: *The Biſhop of Rome — curſing King* John, *and diſcharging his Subjects of their Oath of Fidelity, unto their Sovereign Lord. Now had Engliſhmen, at that time, known their Duty to their Prince, ſet forth in God's Word, would a great many of Nobles, and other Engliſhmen, natural Subjects, for this foreign and unnatural Uſurper his vain Curſe of the King, and for his feigned diſcharging of them of their Oath, and Fidelity to their natural Lord, upon ſo ſlender, or no Ground at*

*at all, have rebelled againſt their Sovereign Lord the King? Would they have ſworn Fidelity to the Dauphine of* France, *breaking their Oath of Fidelity, to their natural Lord the King of* England, &c?

It is well known, that King *John* was no more than a *King in Poſſeſſion*; for *Arthur*, who was his elder Brother's Son, and put in a Claim againſt him, with his Siſter *Eleanor*, whom he kept in Priſon all his Reign, were nearer in Blood to the Throne, than himſelf; and yet we ſee the Homily calls him the Subject's *Sovereign Lord the King*, and *their Natural Lord the King of* England: Condemns thoſe Subjects, that broke their Oath of Fidelity to him, and therefore juſtifies thoſe that took, and kept their Oaths to him; and conſequently Juſtifies others, who take and keep Oaths, to ſuch Kings as he was. In a Word, had you lived in the Reign of King *John*, would you have given your Oath of Allegiance to him? If you would, you need not have refuſed it to *any* King ſince. If you would not, you would have refuſed an Oath, that the *Church* has judged *lawful*.

CHAP.

## CHAP. VIII.

### *Our Laws in this Point, agreeable to the great End, and Deſign of Government.*

BUT our Conſtitution in this Point has the Suffrage of *Reaſon*, as well as *Authority*, on it's ſide. For if we impartially examine the *Reaſons* and *End* of *Government*, we are ſoon convinc'd, that the ſeveral Communities of the World were not deſign'd, as ſo many Scenes for a *few* Perſons to diſplay their Glory in, and all the reſt of Mankind to be only Inſtruments of their Power; but that Government was inſtituted for the Security, and Welfare, of all the Members of Civil Society. Our Church in the firſt Homily againſt Rebellion, has affirmed, *that the Government of a Prince, is a Bleſſing of God given for the Common-wealth, eſpecially of the good and godly, for the Comfort and cheriſhing of whom, God giveth and ſetteth up Princes, and on the contrary part, to the Fear and Puniſhment of the Wicked.* A learned Biſhop, and Caſuiſt of our Church ſaith, that *publick Authority was inſtituted primarily for*

---

*Poteſtas autem publicæ Juriſdictionis, ordinatur primariò in bonum publicum ipſius Communitatis, in bonum vero perſonæ talis poteſtatis*

*the publick Good of the Community it self; and but secundarily and consequentially only, for the Good of the civil Magistrate, as it is profitable to the Prince, that the Commonwealth should flourish.* † *Forteſcue* Lord Chancellor of *England* under King *Henry* the VI, quotes, and approves, *Thomas Aquinas* for the ſame Doctrine. *St.* Thomas, *ſaith he, in the Book which he writ to the King of* Cyprus, *of the Government of Princes, ſaith, that the King is given for the Kingdom, and not the Kingdom for the King.* Had Government been inſtituted, for the Sake of the Prince, and Subjects deſign'd to be only the Inſtruments of his Grandeur and Power; if the Prince came to be diſpoſſeſs'd of his Kingdom, it would have then been reaſonable for the Subjects ſtill to adhere to him, and his Poſterity after him, tho' with the Loſs of all the Benefits of Government, becauſe they were all this while anſwering the *End* of it. But if Government was inſtituted, for the Sake of *all* the Members of the Community, then after they have done what they are able, to

---

*preditæ, id eſt ipſius Magiſtratûs, nonniſi ſecundariò & conſequenter, quatenus nimirum utile eſt Principi, ut Reſpublica floreat. Sanderſon de Oblig. Conſcien Prælect. 7. §. 4.*

† *Sanctus Thomas, in Libro quem Regi Cypri, ſcripſit, de Regimine Principum dicit, quod Rex datur propter Regnum, & non Regnum propter Regem. Forteſcue De Laud. Legum Angliæ. c. 37.*

main-

maintain their Prince in the Throne, if he happens to be diſpoſſeſs'd, and cannot afford them any of the Benefits of Government, can defend neither *himſelf*, *them*, nor his *Right* to govern them; It is not reaſonable that they, for whom Government was inſtituted, ſhould loſe all the Benefits of it, and live *Outlaws* at home, or *Exiles* abroad, for the Sake of him, for whom it was not inſtituted, at leaſt, not *primarily* inſtituted. The Conſequence is as *neceſſary*, as the Principle, whence it is drawn, is *true*; which in ſhort is this, that Government was made for *Man*, and not Man for *Government*; and both the one, and the other are countenanc'd, by our Saviour's Deciſion, of the Lawfulneſs of what his Diſciples did on the Sabbath Day, upon this Principle, *that the Sabbath was made for Man, and not Man for the Sabbath.*

If it ſhould be ſaid, that this Argument, hath been made uſe of by ſome, to juſtify the Reſiſtance of the ſupreme Magiſtrate, when he does not purſue, as they think, the Ends of Government. I anſwer, there is this great Difference, betwixt the *Two* Caſes, that the Laws of the Land, which allow, and require Submiſſion, forbid Reſiſtance.

Secondly, They who employ this Argument for Reſiſtance, are ſo far from purſuing the Ends of Government, by their Hypothe-

ſis, that they deſtroy the very Notion of it. For by making as they do any of the Subjects, as much Judges of the *publick Good*, as thoſe, who are inveſted with the Authority of the Government; and by giving them a Liberty, to overturn both the Laws, and Law-makers, when they do not purſue, what they think to be, the publick Good: They leave no *Authority* in the *Laws*, which according to this Opinion, are no more than *Counſels*, that the Subjects may take, or refuſe, as they think fit: They leave no Difference, betwixt the *Governors* and *Governed*: † In a word, they have no ſuch thing as Government, by not leaving a *Dernier Reſort*, from which there is no Appeal.

## CHAP. IX.

*Our Laws in this Point, agreeable to the Practice of all Mankind, particularly, of* God's *own People, the Jews, and of the Chriſtians of the Earlier Ages.*

AND that this is a reaſonable Notion of Government, we ſhall be farther convinced, now we come in the laſt place, to

† *Si ubi jubeantur, quærere ſingulis liceat, pereunte obſequio, imperium etiam intercidit. Tacit. Hiſt.* 3.

conſider

consider the Practice of Mankind. And here, I shall first consider the Behaviour of those, who may serve for Examples to us, I mean, of Gods peculiar People the *Jews*, and then of the *Christians*, (of the *earlier Ages* especially) who succeeded them in that Relation.

That the *Jews* lived in Subjection to the *Midianites*, the *Moabites*, and other neighbouring Nations, when they were subdued by them, is evident from the Old Testament. That they became Subjects to *Pharaoh Necoh*, K. of *Egypt*, who carri'd away *Jehoahaz* their King Captive into *Egypt*, and set up *Eliakim*, to whom he gave the Name of *Jehoiakim*, to be King over them. After this, they came under Subjection to the King of *Babylon*, who carried away King *Jehoiakim* Captive into *Babylon*, and set his Son *Jeconiah* on the Throne; whom after a Reign of 3 Months, he likewise removes to *Babylon*, and puts his Uncle *Zedekiah* in his Place, who in a while followed the rest into Captivity; after which the Remnant of the *Jews*, that were left in *Judea* lived Subjects to the King of *Babylon*'s Governors, as the Captives in *Babylon* did to his Government there.

If it be said, that *God* by his Prophet *Jeremiah*, *commanded* the Jews to be subject to the King of *Babylon*. It may be answered, that they had submitted to the *Moabites*, to the

King of *Egypt*, &c. without any such Command, that we know of, nay to the King of *Babylon himself*, before this Command was given, which was not till the Reign of *Zedekiah*, who was the second King, that the King of *Babylon* had set over them.

In the next place, it is to be considered, that altho *God's* Command, was of it self abundantly sufficient, to oblige them to submit, yet he was pleased to condescend to give them a Motive, or Reason, for this Submission, *I spake to* Zedekiah *King of* Judah, *according to all these Words, saying, bring your Necks under the Yoke of the King of* Babylon, *and serve him, and his People, and live. Why will ye dye, thou and thy People by the Sword, the Famine and the Pestilence, as the Lord hath spoken against the Nations that will not serve the King of* Babylon.---- *Wherefore should this City be laid wast?* Jer. 27. 12. 13. 17. And thus the Prophet *Jeremiah*, in his Letters to the Captives at *Babylon*, saith, *Seek ye the Peace of the City, where I have caused you to be carried away Captive, and pray unto the Lord for it, for in the Peace thereof, ye shall have Peace*, Jer. 29. 7. Which is thus expressed by *Baruch*, in his Exhortation to the *Jews*, *Pray for the Life of* Nabuchodonosor *King of* Babylon, *and for the Life of* Balthasar *his Son, that their Days may*

be

*be on Earth, as the Days of Heaven. And the Lord will give us Strength, and lighten our Eyes, and we shall live under the Shadow of* Nabuchodonosor *King of* Babylon, *and under the Shadow of* Balthasar *his Son, and we shall serve them many Days, and find Favour in his Sight*, c. 1. v. 11. 12. Thus we see, when God commanded them, to submit to the King of *Babylon*, he was pleased over and above to add this *Reason* for their Submission; that they might thereby live secure under his Protection, and enjoy the Benefits of Government in Peace, and Tranquillity.

Whether the Jews thought this *Command* of *God*, or at least the *Reason* of it, the *Preservation* of themselves under the Protection of Government, did extend to, and would justify their Submission in the like Cases; we find, that after the Destruction of the Babylonish Empire, without any such particular Command, they successively became Subjects of the *Persian*, after that of the *Grecian*, and at last, of the *Roman* Empire, which swallowed up all the rest.

Their Behaviour under that, which is call'd the *Grecian* Monarchy, deserves a more particular Reflection. After the Death of *Alexander*, (to whom the Jews had submitted) several Kingdoms having been formed out of his Conquests, *Judea* was unhappily situated,

betwixt two of the moſt powerful of thoſe Kingdoms: *Egypt*, where the *Ptolomyes*; and *Syria*, where the *Seleucidæ* reign'd. And as theſe great Kings, were engaged in frequent Wars againſt one another; the moſt ſucceſsful way, that either of them had to invade each others Dominions, was firſt to ſubdue *Judea*, as ſometimes one, ſometimes the other of thoſe Kings did; and if you look into *Joſephus*'s Antiquities, you will find, that the Jews became Subjects of the *Egyptian*, or of the *Syrian* Kings, according as thoſe Kings, recover'd or loſt the Poſſeſſion of *Judea*, and yet were ſo far from being reproached for this, that they were highly eſteemed by both for their Fidelity, becauſe they continued firm in their Obedience to the King of *Egypt*, or to the King of *Syria*, as long as the one, or the other, could defend his Government over them.

If you would be ſatisfied in the particulars of what I have here affirmed in general, you need only read the 1,2,3,4, and 5 Chapters of the 12th Book of *Joſephus Antiquities*, where you will alſo find they took Oaths of Fidelity to thoſe Princes.

M. *Fleury*, in his *Manners of the Iſraelites* has given much the ſame Account of their Behaviour under theſe Kings. *As they were ſituated betwixt the Kings of* Syria *and the Kings of* Egypt; *they obeyed ſometimes the former*,

*former, and sometimes the latter, according as these Kings were most powerful.* * The Submission of the Jews to *Alexander*, under their High Priest *Jaddus*, has been much disputed, and Books have been written upon it, *pro* and *con* in this Controversy: But their interchangeable Submission to the Kings of *Egypt*, and of *Syria*, according as the *former*, or the *latter*, became Masters of *Judea*, is *clear*, and admits of no Dispute.

As for the Behaviour of the *Primitive Christians*, after the Revolutions of Government, in the earliest Ages of the Church, we have no Instance of dispossess'd Emperors, claiming against their Rivals; (except it be that of *Maximinus Thrax*, and his Son) and the Empire, not being Hereditary, there could be no claims of *Heirs*. That *Maximinus Thrax*, raised a Persecution against the Christians, out of Hatred to the late Emperor, *Alexander Severus*'s Family, of which many were Believers, we learn from *Eusebius*. † But how the Christians behaved themselves under the Rival Emperors, that were set up against the Two *Maximini*, we have no certain Account. Only in general we find that the two *Gordiani*,

* *Comme ils etoient entre les Rois de Syrie, & les Rois d'Egypte; ils obeïssoient tantoſt aux uns & tantoſt aux autres; ſelon que ces Rois eſtoient les plus forts.* Meurs des Israelites. Part 3. Chap. 3.

† *Eccleſ. Hiſtor. l 6. 28.*

Fa-

Father and Son, that were first saluted Emperors in *Africk*, and afterwards confirmed by the Roman Senate, met with a chearful Submission, both at *Rome* and throughout *Italy*, except in a few Cities; as well as *Maximus* and *Balbinus*, * who were created Emperors upon the Death of the two former, and before the Death of the *Maximini*. I cannot say there is any Testimony, that proves the Submission of the Christians in particular, to these Rival Emperors; Nor is there any, that proves the Christians, who were very numerous at that time, were singular in their Behaviour, amidst this general Submission: And is it probable that so great a Body of Men should adhere to the Dispossess'd Emperors, and no notice should be taken of it in a History, which takes notice of a few Cities that did so? However, in the 4th. 5th. and 6th. Ages we have several Instances, of the Christians becoming Subjects, to New Emperors, whilst the Dispossess'd Emperor was alive. I'll content my self with giving a Precedent of their Behaviour in each of those Ages.

In the Beginning of the 4th. Age, *Constantine* and *Licinius*, who were *Collegues* in the Roman Empire, having publish'd an Edict for the secure Profession of the Christian Religion: *Licinius* notwithstanding a while after began to persecute his Christian Subjects; for which,

* *See Julii Capitolini Maximini Duo.*

Con-

*Conſtantine* engages in a War againſt him, diſpoſſeſſes him firſt of ſome of his Provinces, and afterwards in a Second War, of his Empire of the Eaſt, and reduces him to a private Life; and at laſt, upon his deſigning to raiſe new Commotions, puts him to Death. In the mean time, the Biſhops and Chriſtians, as well as the reſt of the Subjects of *Licinius*, paid a chearful Obedience to *Conſtantine*, as he became Maſter of *Licinius*'s Diviſion of the Empire.

Some learned Men have ſaid, that *Conſtantine* was ſuperior in the Empire to *Licinius*: But it is evident from *Euſebius*, that they were not Joint Emperors, in one Throne: * But the *Roman Empire was divided in two Parts betwixt them.* *Conſtantine*, as elder Emperor, when they met, might have Precedency in Place; but each Emperor was, in his own Part, *abſolute*, and *independent* on the other; and therefore, when they were both Conſuls, in the Weſt that Year is inſcrib'd, *Conſtantine the fourth, and* Licinius *the fourth time Conſul.* But in the Eaſt, *Licinius*'s Name ſtands firſt, inthis manner. Licinius Auguſtus *the fourth, and* Conſtantine *the fourth time Conſuls.* As *Valeſius* proves out of the *Excerpta de geſtis Conſtantini.* †

* *Eccl. Hiſt. l.* 10. *c.* 8. *& in Vita Conſtant. l.* 1 *c.* 49.
† *Valeſ. Not. ad vitam Conſtant. l.* 2. *c.* 6.

In

In the Fifth Century, the Emperor *Zeno* was dispossess'd, and driven into *Isauria*, by *Basiliscus*, who, by Usurpation, mounted the Imperial Throne: And yet after he was settled in it, had so general a Submission, that we find no less than 500 Bishops, and amongst them, Three of the Four Eastern Patriarchs, subscribing to *Basilicus*'s Circular Letters, for anathematizing the Council of *Chalcedon*, and *Leo*'s *Tome*. It must be confess'd, that these Bishops, who discover'd such Pusillanimity, and Levity, in condemning the Council of *Chalcedon*, are not to be set up for Examples: And yet I do not find but the rest of the Subjects, particularly the great *Acacius*, Patriarch of *C. S.* a Man of inflexible Resolution and Courage, who maintain'd the Authority of the Council of *Chalcedon*, and could not be induced, by all the Menaces of *Basiliscus*, to subscribe his Circular Letters, did, at the same time, acknowlege his Imperial Authority, as much as those that had subscribed.†

Some, I know, have said that the Emperors were not pray'd for, *by Name*, in the earlier Ages. That they were pray'd for when they were Pagans we are sure; whether by Name I'll not be positive: But that they were prayed for by name, after they were Christians, I think there is no doubt *. That they were

† *See Evagr. Eccl. Hist. l.* 3. *c.* 3. 4 5. 6 7. 8.
* *Vid. Euseb. In Vita Constant. l.* 4 *c.* 20.

prayed

prayed for by name in the Age, we are now speaking of, we are assur'd by a Passage in Pope *Gelasius*'s Epistle, † *ad Episcopos Dardaniæ*, where he takes Notice, that the Emperor *Zeno* colour'd over his Displeasure against *Calendion*, Bishop of *Antioch*, with a Pretext, that he had razed his Name out of the Diptychs, in favour of the Two Rebels *Leontius* and *Illus*. *

In the Sixth Century after the *Goths*, had establish'd themselves in *Italy*, and made *Rome* the Capital of their Kingdom, and the *Romans* had lived a good while in Subjection to the *Gothick* Kings: The Emperor *Justinian*, about the Year 535. sends an Army into *Italy*, under his famous General *Belizarius*, upon whose approach *Theodatus*, K. of the *Goths*, quits *Rome*, and the Romans to avoid ruin, open'd their Gates to *Belizarius*. However, in a little while, the *Goths* return'd under their new K. *Vitiges*, and laid Siege to *Rome*, which *Belizarius* defended, and forced them to raise the Siege, after they had lain above a Year before it. † *Silverius* was Bishop of *Rome*, when it was reduced by *Belizarius*, having been promoted to that See by *Theodatus*, late King of the *Goths*. He was at this time, under the Dis-

† *Epist.* 13. *in the* 4. *Tome of Labb. & Cossart. Councils.*

* *See Evagr. Eccl. Hist. L.* 3. *c.* 16. and another Instance of the same, in his Successor *Anastasius. Evagr. l.* 3. *c.* 34.

† It appears from *Procopius de bello Gothico l.* 1. *c. XI. that Silverius*, as well as the Roman Senate, and People, took Oaths to the Gothick Kings.

plea-

pleasure of the Empress *Theodora*, who resolv'd to deprive him of his See, because he would not communicate with the Heretical Bishop *Anthimus*, and to advance his Deacon *Vigilius*, who was then at *C. S.* and had promised the Empress, he would communicate with *Anthimus*, if she would make him Bishop of *Rome*. This was resolved on, but she wanted a plausible Pretext for the Deprivation of *Silverius* : The true Cause, his not communicating with *Anthimus*, the *Acephalist*, she durst not own to the Emperor. But could she want a fair Pretence ? Had not *Silverius* lived a Subject, under the *Gothick* Kings, and been advanc'd by one of them to the Roman See ? And if this was a Fault, was not he more obnoxious than any Man, not only as he was Bishop, but also as the first Citizen of *Rome* ? But this was so far from being esteemed a Fault then, that in the Account of his mortal Enemies, who were seeking his Ruin, it would not bear an Accusation : And therefore *Theodora*'s Instruments, were forced, to have recourse to the Subornation of Witnesses, and to forged Letters, to prove him guilty of a Conspiracy, to betray *Rome* into the Hands of the Gothick King, when he laid Siege to It : * For to un-

* *Liberati Diaconi Breviar. c.* 22. who lived at the same time, *Anastasius Bibliothec. in Vita Silverii.* der-

dermine a Government by Treachery, or to Revolt from it whilſt it ſtands, were ever eſteemed Crimes; but to ſubmit to a ſuperior Power never was, even their Enemies being Judges, when a Prince could no longer defend his Government, nor People againſt it.

I ſhould now in the laſt Place, alledge the Practice of all Mankind; but this would be to write a Hiſtory of the Revolutions, that have happen'd in all Ages, and Countries of the World, and of the Submiſſion of Nations, to the new Governments after their Eſtabliſhment. We need only look abroad, and ſee what is practiſed in our own time, in the ſeveral Parts of the Spaniſh Dominions, in *Italy*, in the Iſles of the *Mediterranean*, in the *Spaniſh Netherlands*, and in *Spain* it ſelf: In all which the Inhabitants take Oaths of Fidelity to the one, or the other, of their Rival Kings, as they come under their Power.

And what has been thus univerſally practiſed; is, as a learned forreign Lawyer affirms, as univerſally juſtified: *'Tis acknowledged by all*, ſaith *Puffendorf*, *that Subjects, after their Prince can afford them no Protection, may ſubmit to another, to preſerve themſelves from Ruin.* *

* *Illud omnes fatentur, poſſe populum Regi Subjectum, ad declinandum excidium, & poſtquam in Rege nihil amplius eſt præſidii, alteri ſeſe ſubmittere.* Puffend. de Jure naturæ & Gentium, l. 7. c. 7. § 4.

In

In Answer to this Argument, from the Practice of other Nations. It has been said, *that we know not what* their *Constitutions are, at least, they differ very much from* ours. There is no doubt, but their several *Constitutions* differ, in several Points from ours, and from each other too; and yet how much soever they differ, we find, that upon the common Reasons and End of Government, and from the Nature of the Obligations to it, the several Nations of the World, have *agreed* in this: That after they have done what they can to preserve their *Prince*, they are at Liberty to *preserve themselves*, under a new Government, when the Prince can neither defend himself, them, nor his Government over them. And without examining into the particular Constitutions of other Countries, after the foregoing Discourse, I may venture to say with some Assurance, that there is no Country in the World, where the Laws, after the Care they have first taken, to secure the Prince in his Throne, have made a better Provision, for the Peace of the Community, and the Security of its Members upon Revolutions; or do more expressly *allow*, *justify*, and *require* the Subjects to submit to the Prince in Possession, than *our own*; because, perhaps, no Country in the World, has had more Revolutions of Government, than *ours*. And to end where I began, since the *Laws*, which are the Rule of Civil Subjection, require This,

*Oportet neminem esse sapientiorem Legibus.*

*FINIS.*